

No. 11399

IN THE

N. 2451

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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SEARS, ROEBUCK & CO., a corporation,

Appellant,

vs.

FRED HARTLEY,

Appellee.

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## TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

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FILED

OCT 15 1906

PAUL P. O'BRIEN,  
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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*Sears, Roebuck & Co., a Corporation*

In the United States District Court  
Southern District of California  
(Central Division)

No. 5103-M

FRED HARTLEY,

Plaintiff,

vs.

SEARS, ROEBUCK & CO., a corporation, ZENITH  
RADIO CORPORATION, FIRST COMPANY,  
a corporation, SECOND COMPANY, a corporation,  
THIRD COMPANY, a partnership, DOE ONE and  
DOE TWO, co-partners, DOE THREE, DOE  
FOUR and DOE FIVE,

Defendants.

CERTIFIED COPY OF RECORD FOR REMOVAL

In the Superior Court of the State of California in and  
for the County of Los Angeles

No. 508900

FRED HARTLEY,

Plaintiff,

v.

SEARS, ROEBUCK & CO., a corporation, ZENITH  
RADIO CORPORATION, FIRST COMPANY, a  
corporation, SECOND COMPANY, a corporation,  
THIRD COMPANY, a partnership, DOE ONE and  
DOE TWO, co-partners, DOE THREE, DOE  
FOUR and DOE FIVE,

Defendants.

COMPLAINT FOR DAMAGES  
(Personal Injury)

Plaintiff complains of defendants and for cause of action alleges as follows:

I.

That the true names and capacities of the defendants herein referred to as First Company, Second Company, Third Company, Doe One, Doe Two, Doe Three, Doe Four and Doe Five are unknown to the plaintiff at this time, and plaintiff will ask leave of court to amend this complaint to show their true names when they have been ascertained.

II.

That Sears, Roebuck & Co., is a New York corporation, authorized to do business in the State of California, and is doing [2] business in the County of Los Angeles, State of California; that Zenith Radio Corporation is a corporation organized and existing under and by virtue of the laws of some state, and is authorized to do business in the County of Los Angeles, State of California; that First Company and Second Company are corporations organized and existing under and by virtue of the laws of some state, and is authorized to do business in the County of Los Angeles, State of California.

III.

That on or about the 13th day of October, 1945, at or about the hour of 8:15 P. M. on said day, on the premises known as the Sears, Roebuck & Co. store located at 2650 East Olympic Boulevard, in the County of Los Angeles, State of California, the defendants, and each of them, so carelessly, recklessly and negligently placed a foreign substance in plaintiff's left ear as to block the passage of

the canals of said ear and the ear orifice, and so as to injure the plaintiff as hereinafter set forth.

#### IV.

That as a direct and proximate result of said carelessness, recklessness and negligence on the part of the defendants, and each of them, plaintiff was rendered sick and sore, and was caused excruciating pain and was caused to suffer an infection in and about his left ear at or near the brain, and other internal injuries, as well as a severe shock to plaintiff's nervous system, all to the damage of plaintiff in the sum of Ten Thousand Dollars (\$10,000.00).

#### V.

Plaintiff is informed and believes, and therefore alleges, the fact to be that his said injuries are permanent in their nature and will render him permanently disabled through the remainder of his natural life.

#### VI.

That as a direct and proximate result of the said carelessness- [3] ness, recklessness and negligence of the defendants, and each of them, and the said injuries inflicted upon the plaintiff, Fred Hartley, plaintiff has incurred a hospital bill for his care in a sum unknown to plaintiff at this time, and has incurred reasonable bills for surgeons' care and attention and for nurses' care and attention and for x-rays and for medicines, and plaintiff is informed and believes and therefore alleges that he will incur further bills in the treatment of his injuries, and plaintiff will ask leave of court to amend this complaint to show the true and correct amount of said special damages when such amounts are ascertained.

VII.

That at all times herein mentioned the defendants Doe Three, Doe Four and Doe Five were acting as the agents, servants and employees of the defendants Sears, Roebuck & Co., a corporation, Zenith Radio Corporation, First Company, a corporation, Second Company, a corporation, and Third Company, a partnership, and were acting within the course and scope of said employment.

And by Way of a Second, Separate and Distinct Cause of Action Against the Defendants, and Each of Them, Plaintiff Alleges as Follows:

I.

Repeats and realleges as though set forth in full, Paragraphs I, II and VII of his first cause of action.

II.

That at all times herein mentioned, the defendants Sears, Roebuck & Co., a corporation, Zenith Radio Corporation, a corporation, First Company, a corporation, Second Company, a corporation, and Third Company, a partnership, maintained and operated a hearing aid sales and fitting department located in certain premises belonging to the defendant Sears, Roebuck & Co., a corporation, and located in the City of Los Angeles, County of Los Angeles, State of [4] California;

That at all said times, the defendants, and each of them, held themselves out to the public to be competent and skillful in the work incident to the conduct and opera-

tion of a hearing aid sales and fitting department and in the work of what is commonly known as fitting hearing aids or mechanical devices to the ears and heads of any members of the public who might seek to the goods, wares, merchandise and services of said defendants, and any of them, and for a compensation, the goods, wares, and merchandise so bargained and sold and the services so rendered in connection therewith.

### III.

That on or about the 13th day of October, 1945, in said hearing aid sales and fitting department located on the premises of the defendant Sears, Roebuck & Co., a corporation, as herein set forth in Paragraph II of this complaint, plaintiff employed the defendants, and each of them, for a compensation, to sell to plaintiff and fit in plaintiff's ears, an electric hearing aid or device, said device being then and there bargained and sold by said defendants, and each of them, and said fitting to the human ear being a service rendered to any person so buying said hearing aids, as herein set forth.

### IV.

That the defendants, and each of them, entered upon the performance of said employment and said sale, and did pretend and attempt to fit a certain hearing device in the ear and head of plaintiff in consideration of the sale to plaintiff of said hearing aid and/or device.



## V.

That at said time and place as aforesaid, and while attempting to and pretending to fit said hearing aid, said defendants, and each of them, did negligently, carelessly, incompetently and unskillfully undertake the operation of fitting said electric hearing [5] aid or device on or about the head and ear of plaintiff; that by reason of the negligence, carelessness, incompetence and unskillful conduct of the defendants, and each of them, as aforesaid, a certain foreign substance became permanently lodged and fixed in plaintiff's left ear so as to block the passage of the canals of said ear and the ear orifice;

That as a direct and proximate result of said carelessness, negligence, incompetence and unskillful conduct upon the part of the defendants, and each of them, plaintiff was rendered sick and sore and was caused excruciating pain and was caused to suffer an infection in and about his left ear at or near the brain, and other internal injuries, as well as a severe and serious shock to plaintiff's nervous system, all to plaintiff's damage in the sum of Ten Thousand Dollars (\$10,000.00).

## VI.

That as a direct and proximate result of the said carelessness, negligence, incompetence and unskillful conduct of the defendants, and each of them, and as a result of the injuries inflicted upon him, plaintiff has incurred a hospital bill, and has incurred reasonable bills for surgeons' and nurses' care and reasonable sums for x-rays and medicines, and plaintiff has been informed and be-

lieves, and therefore alleges, that he will incur further bills for the treatment of his injuries, and plaintiff asks leave of court to amend this complaint to show the true and correct amount of said sums when such amounts are ascertained.

## VII.

That at all times herein mentioned, the defendants, and each of them, held themselves out, and held out their agents, servants and employees, to members of the general public as being persons possessed of skill in fitting those certain electric hearing aids and/or devices sold by defendants, and *each them*; that the defendants, and each of them, represented themselves and their [6] employees to be possessed of that degree of skill in the fitting of electric hearing aids and/or devices as other persons engaged in the fitting of electric hearing aids and/or devices in said community in which defendants, and each of them, and their servants, agents and employees, carried on their profession.

Wherefore, plaintiff prays judgment against defendants, and each of them, in the sum of Ten Thousand Dollars (\$10,000.00), general damages, for such special damages as may hereafter be proved and allowed, for his costs of court, and for such other and further relief as the court may deem proper.

CHASE, BARNES & CHASE

By Stanley N. Barnes

Attorneys for Plaintiff

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL TO THE DISTRICT  
COURT OF THE UNITED STATES

To the Honorable, the Superior Court of the State of  
California, in and for the County of Los Angeles:

Sears, Roebuck and Co., a corporation, appearing specially herein for itself alone and for no other defendant herein, for the sole and only purpose of having the above entitled cause removed to the District Court of the United States, files this, its petition for the removal of the said cause from the above entitled court, in which it is now pending, to the District Court of the United States for the Southern District of California, General Division, and in support of said petition respectfully shows:

I.

That the above entitled action was commenced and the [8] complaint therein filed in the above named court on the 28th day of December, 1945, and summons was issued on said date and said action is now therein pending. Summons and complaint were served upon defendant and the time within which petitioner herein is required to answer or plead to plaintiff's complaint as required by the laws of the State of California and the practice of this court has not yet expired. Defendant has not heretofore appeared in said action.

## II.

That the above entitled action is one of a civil nature at law over which the District Courts of the United States have original jurisdiction. That Fred Hartley, plaintiff in said action, was at the time of the commencement of said action and now is a citizen of the State of California and a resident of the County of Los Angeles in said State. That Sears, Roebuck and Co., one of the named defendants in said action, was at the time of the commencement of said action and still is, a corporation organized under and existing by virtue of the laws of the State of New York, with its principal place of business in the City of New York in said State, and then was and still is a citizen and resident of the State of New York. That Zenith Radio Corporation, the other of the named defendants in said action, was at the time of the commencement of the action and still is, a corporation organized and existing under and by virtue of the laws of some state other than the State of California, with its principal place of business in the City of Chicago, Illinois, and then was and still is a non-resident of the State of California.

## III.

That the value of the matter in controversy in said action exceeds \$3,000, exclusive of interest and costs, as appears from the allegations of plaintiff's complaint.

## IV.

Petitioner presents herewith a bond with good and sufficient [9] surety that it will enter in the District

Court of the United States for the Southern District of California, Central Division, within thirty days of the date of filing of this petition, a certified copy of the record in this suit and that it will pay all costs that may be awarded by said District Court in case the said Court shall hold that this suit was wrongfully or improperly removed thereto.

V.

That prior to the filing of this petition and of said bond for the removal of said cause, written notice of intention to file the same was given to the plaintiff by petitioner as required by law, a true copy of which, with proof of service of the same, is attached hereto.

Wherefore, petitioner prays that this Court proceed no further herein except to make an order of removal as required by law and to accept said surety and bond and to cause the record herein to be removed into said District Court of the United States within and for the Southern District of the State of California, Central Division, according to the statute in such cases made and provided.

Dated: January 10th, 1946.

JOHN L. WHEELER  
Attorney for Petitioner

[Verified.]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jan. 12, 1946. [10]

[Title of Superior Court and Cause.]

ORDER OF REMOVAL TO UNITED STATES  
DISTRICT COURT

Good cause appearing and there having been presented to the Court a petition and bond in due form for removal of the above-entitled action to the District Court of the United States for the Southern District of California, Central Division, and it further appearing that written notice of said petition and bond for removal has been given plaintiff in the above-entitled action prior to filing the same,

Now, Therefore, It Is Ordered:

1. That said petition for removal be and the same hereby is granted, that the above-entitled action be and the same hereby is removed to the District Court of the United States for the Southern District of California, Central Division. [11]

2. That said bond presented herewith be and the same hereby is approved.

3. That the Clerk of this Court be and he hereby is ordered and directed to prepare a certified transcript and copy of the record herein to be filed with the said District Court of the United States in the manner and form as provided by law in such case.

4. That all proceedings in this Court in said cause be stayed.

Dated: January 12th, 1946.

W. TURNEY FOX  
Judge of the Superior Court

[Endorsed]: Filed Jan. 12, 1946. [12]

State of California  
County of Los Angeles—ss.

No. 508900

I, J. F. Moroney, County Clerk and Clerk of the Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents consisting of the Complaint, Notice of filing and hearing petition for removal, Petition for Removal, Bond on Removal and Order of Removal to the United States District Court, Southern District of California (Central Division), in the action of Fred Hartley vs. Sears, Roebuck & Company, a corporation, et al., to be a full, true and correct copy of all of the original documents on file and/or or record in this office in the above entitled action to and including the date of filing the signed order for Removal to the said United States District Court, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 1st day of February, 1946.

[Seal]

J. F. MORONEY

County Clerk and Clerk of the Superior Court of the  
State of California, in and for the County of Los  
Angeles

By E. Morris, Deputy [13]

[Endorsed]: Filed Feb. 2, 1946. [14]



[Title of District Court and Cause.]

No. 5103-M Civil

ANSWER TO COMPLAINT

Comes now the defendant, Sears, Roebuck and Co., and answering for itself alone and not for any other defendant herein, admits, denies and alleges as follows:

I.

Answering Paragraph II, admits the allegations of said paragraph. Alleges that the correct name of this defendant is Sears, Roebuck and Co.

II.

Answering Paragraph III, denies generally and specifically said paragraph and each and every allegation therein contained. [15]

III.

Answering Paragraph IV, denies generally and specifically said paragraph and each and every allegation therein contained. Further answering said paragraph, denies that the plaintiff was damaged as alleged, or at all, or in the amount alleged, or in any other amount.

IV.

Answering Paragraphs V, VI and VII, denies generally and specifically said paragraphs and each and every allegation therein contained.



Answering Plaintiff's Second, Separate and Distinct Cause of Action, This Answering Defendant Admits, Denies and Alleges as Follows:

I.

Answering Paragraph I, admits the allegations of Paragraph II of plaintiff's First Cause of Action realleged in said paragraph; denies Paragraph VII and each and every allegation therein contained of said First Cause of Action realleged in said paragraph.

II.

Answering Paragraph II, admits that this answering defendant was engaged in the sale of hearing aids at its retail store situated at 2650 E. Olympic Boulevard in the City of Los Angeles, State of California. Except as herein admitted, denies each and every allegation of said paragraph.

III.

Answering Paragraph III, admits that on or about the 13th day of October, 1945, this answering defendant sold to plaintiff an electric hearing aid. Except as herein admitted, denies said paragraph and each and every allegation therein contained. [16]

IV.

Answering Paragraph IV, admits that a hearing aid device was fitted in the ear of plaintiff. Except as herein admitted, denies said paragraph and each and every allegation therein contained.

## V.

Answering Paragraphs V and VI, denies generally and specifically said paragraphs and each and every allegation therein contained. Further answering said paragraphs, denies that the plaintiff was damaged as alleged, or at all, or in the amount alleged, or in any other amount.

## VI.

Answering Paragraph VII, denies generally and specifically said paragraph and each and every allegation therein contained.

For a Further, Separate, and Second Defense, Defendant Alleges:

## I.

That any injury or damage sustained by the plaintiff at the time alleged was caused or contributed to by the failure of the plaintiff to exercise any care or protection for his own safety whatever.

Wherefore, this answering defendant prays that said action be dismissed, and that it recover its costs and disbursements hereof.

JOHN L. WHEELER

Attorney for Defendant Sears, Roebuck and Co.

Dated: February 6th, 1946. [17]

[Affidavit of Service by Mail.] [18]

[Verified.]

[Endorsed]: Filed Feb. 7, 1946. [19]

[Title of District Court and Cause.]

INSTRUCTIONS REQUESTED BY PLAINTIFF

Plaintiff's

Requested Instruction

No. 8

Instruction No. ....

The Court instructs the jury that in estimating the plaintiff's damage, if the jury find for the plaintiff, it is proper for the jury to estimate the effect of the injuries in the future upon plaintiff's physical condition, if any, as well as the effect it has had upon the plaintiff already, and the bodily pain and suffering, and the mental suffering, past, present and future, endured by him as a result of the injuries received by him, and all necessary expenses and damages, past, present and future, such as expenses for medicine, medical and surgical attention, hospital and nurses, to the reasonable value thereof, which the jury believes from the evidence he has incurred, or in the future will incur by reason of said injuries and directly caused thereby.

Not Given: except as covered. McCormick, J.

~~Refused:~~ [21]

Plaintiff's

Requested Instruction

No. 9

Instruction No. ....

The Court instructs the jury that if you find that the plaintiff is entitled to recover in this action, the amount of recovery is for you to determine from all the facts in the case. Of course, you can not measure in dollars and cents

the exact amount plaintiff is entitled to, but it is for you to say, in the exercise of a sound discretion, from all the facts in the case, after considering and weighing all the facts in the case, without fear and without favor, and without passion and prejudice, what amount of money will reasonably compensate him for the damage and injury he has suffered, not exceeding the sum of Ten Thousand Dollars (\$10,000.00) general damages prayed for in his complaint. If you find for the plaintiff in this case under the instructions given by the Court, and that the plaintiff has sustained damages as set forth in his complaint, then to enable the jury to estimate the amount of damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damage, but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their knowledge, observation and experience in business affairs of life. If you find for the plaintiff, then, in assessing plaintiff's damages, if any damages alleged in his complaint are proven, you have a right to take into consideration the nature, extent and character of the injury sustained by plaintiff so far as the same is shown by the evidence, if any such are shown, pain and suffering undergone by him in consequence of such injury, if any such is shown by the evidence, and assess his damages at such sum as in your judgment will compensate the plaintiff for such damages, injury, pain and suffering.

Not Given: except as properly covered. McCormick, J.

~~Refused:~~ [22]

Plaintiff's

Requested Instruction

No. 14

Instruction No. ....

~~You are hereby instructed that~~ If you should find for the plaintiff, then in fixing the sum in assessing the damages, you will be reasonable and just and fix such sum as will in your honest and deliberate judgment, compensate the plaintiff for his injuries, if any, he has sustained as a result of the fitting of the hearing aid. The elements entering into such damages are as follows:

1. Such sum as will reasonably ~~and fairly~~ compensate the said plaintiff for the necessary expenses, if any, that he has ~~incurred or paid, or which he is reasonably certain to incur or pay in the future,~~ by reason of the plaintiff's injuries, if any, for doctor bills, hospital bills, ~~x-ray pictures,~~ ambulance service, ~~nurse hire,~~ and medicines, sundries and ~~surgical supplies.~~ not to exceed \$23.00.

2. Such sum as the jury shall award the plaintiff by reason of the physical pain, if any, which he has suffered by reason of his said injuries, if any, or which he is reasonably certain to suffer in the future therefrom, if any.

The element with respect to the expense incurred to date hereof, if any, is subject of direct proof and must  
direct

be determined by the jury from the  $\wedge$  evidence that they have before them. The element with respect to the pain and suffering, if any, of the plaintiff is left to the sound

discretion of the jury for their determination under all the evidence and circumstances in proof in this case.

~~In estimating the amount of general damages, you may consider what, before he sustained his injuries, if any, was the plaintiff's health and physical ability; also the extent to which, if at all, the injuries which he received, if any, are permanent in their character.~~

The general damages in all, however, that may be sued awarded to the plaintiff, cannot exceed the amount ~~alleged~~ for ~~therefor~~, to wit, the sum of Ten Thousand Dollars (\$10,000.00). The amount sued for is no criterion or tip as to the damages you may award, if any, but is merely a limit by and which you cannot go in any event.

Given: As modified. McCormick, J.

~~Refused:~~ [23]

Plaintiff's

Requested Instruction

No. 23

Instruction No. ....

The Court instructs the jury that if you find for the plaintiff, you will assess his damages at such a sum of money as in your opinion will be a reasonable and just compensation for the injuries he has sustained. In estimating the damages, you will take into consideration the physical and mental pain, if any, he has sustained

by reason of such injuries, if any; and if you believe from the evidence that plaintiff has not recovered and that his injuries are permanent, and that he will hereafter suffer pain and anguish therefrom, then you will take this into consideration in estimating the damages.

Not Given: McCormick, J.

~~Refused:~~ [24]

Plaintiff's

Requested Instruction

No. 25

Instruction No. ....

You are further instructed that in support of the general damages claimed by the plaintiff Fred Hartley, limited by the allegations of the complaint to a sum not in excess of Ten Thousand Dollars (\$10,000.00), it is your duty, should you find in favor of the plaintiff and against the defendant, to award the plaintiff the special damages proved to have been paid or incurred by the plaintiff for hospital bills, doctor bills, nursing bills, and any other special damages which have arisen from the injury and been proven, and which the evidence discloses were reasonable and were necessarily incurred or paid by the plaintiff by reason of the fitting of the hearing aid on plaintiff on or about October 13, 1945.

Not Given: properly and sufficiently covered in charge.  
McCormick, J.

~~Refused:~~ [25]



Plaintiff's

Requested Instruction

No. 26

Instruction No. ....

You are instructed that while the expenses incurred or paid for by the plaintiff by reason of his injuries, including any doctor bills, is a matter of direct proof on the part of the plaintiff in this case, and must be established by evidence introduced at the trial, yet you are instructed that if the plaintiff is entitled to recover, in determining what he is entitled to recover for mental and physical pain and suffering which he has suffered, if any, you are not bound by direct proof as to the amount the plaintiff is damaged, and the only rule or law to govern you is your enlightened conscience as impartial jurors. In other words, if you find the defendant liable, you should award the plaintiff Fred Hartley for his pain and suffering such sum as your consciences dictate would be just compensation for the pain and suffering which he has undergone in the past and which he is reasonably certain to undergo in the future.

Not Given: except as covered. McCormick, J.

~~Refused:~~ [26]

Instructions Requested by Defendant

#7

You are not permitted to award plaintiff speculative damages, by which term is meant compensation for prospective detriment which, although possible, is remote, conjectural or speculative.

Given McCormick, J.

Granted

Not Granted [27]



12

If your verdict should be for Plaintiff you should, in calculating his general damages, make no award for loss of earnings because there is no evidence of loss of earnings as a result of this accident. For the same reason you should make no award for loss of future earnings because there is no evidence that any earnings will be lost in the future as a result of this accident.

Given McCormick, J.

Granted

Not Granted [28]

13

If your verdict should be for the Plaintiff you must award him, in addition to his special damages, covered by another instruction, general damages to compensate him for his pain, suffering, and anxiety, if any, resulting from this accident. The evidence does not show any permanent impairment of plaintiff's hearing resulting from this accident and therefore, in fixing general damages, if you find for the Plaintiff, you should fix your award of general damages in such sum as will compensate Plaintiff for such pain, suffering and anxiety, if any, as you find that Plaintiff has suffered in the past as a result of this accident.

Not Given except as covered elsewhere. McCormick, J.

Granted

Not Granted

[Endorsed]: Filed May 9, 1946. [29]

[Title of District Court and Cause.]

OBJECTIONS TO INSTRUCTIONS REQUESTED  
BY PLAINTIFF

\* \* \* \* \*

III.

Plaintiff's requested instruction number eight is unsupported by the evidence. There is no evidence that Plaintiff will be put to future expense as a result of this accident and there is no evidence of any permanent injuries resulting from this accident.

IV.

Plaintiff's instruction number nine is unsupported by the evidence because there is no evidence of damage to Plaintiff which would justify an award in the amount of ten thousand dollars (\$10,000.00) as impliedly authorized in such instruction.

V.

Plaintiff's instruction number fourteen is unsupported by the evidence. There is no evidence that Plaintiff suffered permanent injuries. There is no evidence that Plaintiff will have future expense as a result of this accident. There is no evidence which would justify an award of damages in the amount of ten thousand dollars (\$10,000.00). [30]

\* \* \* \* \*

VIII.

Plaintiff's requested instruction number twenty-three is unsupported by the evidence. There is no evidence that as a result of this accident Plaintiff suffered permanent

injuries. There is no evidence that he will have future pain and suffering as a result of this accident.

IX.

Plaintiff's requested instruction number twenty-five is unsupported by the evidence because there is no evidence of damage to Plaintiff which would justify an award in the amount of ten thousand dollars (\$10,000.00) as impliedly authorized in such instruction.

X.

Plaintiff's requested instruction number twenty-six is unsupported by the evidence because there is no evidence that Plaintiff will suffer in the future as a result of this accident.

\* \* \* \* \*

[Endorsed]: Filed May 9, 1946. [31]



[Title of District Court and Cause.]

VERDICT

We, the Jury in the above-entitled cause, find for the Plaintiff, Fred Hartley, and against the Defendant, Sears, Roebuck & Company, and assess general damages in the sum of Three Thousand Dollars and special damages in the sum of Twenty-three Dollars.

Los Angeles, California  
May 9th, 1946.

MILTON HOLDEN BERG  
Foreman

[Endorsed]: Filed May 9, 1946. [32]

United States District Court  
Southern District of California  
Central Division  
5103-M Civil

FRED HARTLEY,

Plaintiff,

vs.

SEARS, ROEBUCK AND CO., a corporation,

Defendant.

### JUDGMENT ON VERDICT

On the 8th day of May, 1946, this cause came on for trial before the court and a jury duly impanelled on said day; Chase, Barnes and Chase, Esqs., by Robert E. Moore, Jr., Esq., appearing as counsel for the plaintiff, and John L. Wheeler and John Sobieski, Esq., appearing as counsel for the defendant; and the trial having proceeded with on said 8th day of May, 1946, before the court and said jury, and during the trial of said cause, testimony having been adduced and exhibits admitted on behalf of the respective parties; and the parties having rested, and respective counsel having argued to the jury, was continued to and the court instructed the jury on the 9th day of May, 1946; and

On the 9th day of May, 1946, after the instructions of the court, said cause was submitted to the jury for its consideration and verdict; and after consideration thereof, the jury thereafter on said 9th day of May, 1946, having

returned into court, and after presenting its verdict, which was read by the Clerk, the court ordered the verdict as presented and read, filed and entered, and is as follows:

“In the District Court of the United States in and for the Southern District of California, Central Division

Fred Hartley, Plaintiff, vs. Sears, Roebuck & Company, a corporation, Defendant. No. 5103-M Civil

### VERDICT

We, the Jury in the above-entitled cause, find for the Plaintiff, Fred Hartley, and against the Defendant, Sears, Roebuck & Company, and assess general damages in the sum of Three Thousand Dollars, and special damages in the sum of [33] Twenty-three Dollars.

Los Angeles, California

May 9th, 1946

MILTON HOLDEN BERG

Foreman.”

Filed May 9, 1946. Edmund L. Smith, Clerk, by B. B. Hansen, Deputy Clerk.

Now, Therefore, by virtue of the law and by reason of the premises aforesaid,

It Is Hereby Ordered, Adjudged and Decreed:

That the plaintiff, Fred Hartley, do have and recover of and from the defendant, Sears, Roebuck & Company, a corporation, the sum of Three Thousand Dollars

(\$3,000.00) general damages, and special damages in the sum of Twenty-three (\$23.00) Dollars, together with his costs to be taxed. Cost taxed at \$63.60.

Dated: Los Angeles, California, May 10th, 1946.

PAUL J. McCORMICK

United States District Judge

Judgment entered May 10, 1946. Docketed May 10, 1946. Book 38, page 391. Edmund L. Smith, Clerk, by B. B. Hansen, Deputy.

[Endorsed]: Filed May 10, 1946. [34]

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice is hereby given that Sears, Roebuck and Co., defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 10th day of May, 1946.

Dated: June 29th, 1946.

JOHN L. WHEELER

JOHN G. SOBIESKI

Attorneys for Defendant.

[Endorsed]: Filed, mailed copy to Chase, Barnes & Chase, attys. for plf. Jul. 1, 1946. [35]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT RELIES AND DESIGNATION OF RECORD

POINTS ON WHICH APPELLANT RELIES

1. The evidence is insufficient to justify the verdict.
2. Excessive damages appearing to have been given under passion and prejudice.
3. Errors in law occurring at the trial in the following particulars:
  - (a) Failure to grant appellant's motion for a directed verdict.
  - (b) Instructing the jury, over appellant's objection, that in assessing general damages one element they should consider was the pain, if any, which plaintiff was reasonably certain to suffer in the future and [36] refusing to give the instruction requested by appellant that in assessing general damages the jury should compensate plaintiff only for such pain, suffering and anxiety, if any, as plaintiff suffered in the past.
  - (c) Instructing the jury, over appellant's objection, that the general damages they may award plaintiff may be as much as ten thousand dollars (\$10,000.00).

\* \* \* \* \*

Dated: 19 July 1946.

JOHN L. WHEELER  
JOHN G. SOBIESKI

Attorneys for Defendant and Appellant  
Sears, Roebuck and Co. [38]

Received copy of the within document Jul. 20, 1946.  
Chase, Barnes & Chase, MD.

[Endorsed]: Filed Jul. 20, 1946. [39]

[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 39 inclusive contain full, true and correct copies of Complaint for Damages; Petition for Removal to the District Court of the United States; Order of Removal to United States District Court; Certificate of Clerk of the Superior Court to Removal Papers; Answer to Complaint; a Portion of the Requested Instructions; a Portion of the Objections to Instructions Requested by Plaintiff; Verdict; Judgment on Verdict; Notice of Appeal; Statement of Points and Designation of Record which, together with copy of the reporter's transcript of the trial on May 8 and 9, 1946, and the original exhibits, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$7.95 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 29 day of July, A. D. 1946.

(Seal)

EDMUND L. SMITH,

Clerk,

By Theodore Hocke,  
Chief Deputy Clerk.



[Title of District Court and Cause.]

Honorable Paul J. McCormick, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Plaintiff: Chase, Barnes & Chase, by Robert E. Moore, Jr., Esq.

For the Defendant: John L. Wheeler, Esq., and John G. Sobieski, Esq.

Los Angeles, California, Wednesday, May 8, 1946.  
10:00 A. M.

(A jury was duly empaneled and sworn.)

Mr. Moore: Your Honor please, I don't know whether an opening argument is in order in this matter, but I wish to state that I waive opening argument at this time. I think your Honor has stated the issues very well.

The Court: The defendant, if he desires to make a statement, may make it later on.

Mr. Wheeler: I have no desire to make it.

The Court: Very well.

Mr. Moore: I will call Mr. Hartley, please.

FREDERICK HARTLEY,

the plaintiff herein, called as a witness in his own behalf, having been previously sworn, was examined and testified as follows:

Direct Examination.

The Clerk: State your name, please.

The Witness: Frederick Hartley.

(Testimony of Frederick Hartley)

By Mr. Moore:

Q. Mr. Hartley, you are the plaintiff in this action against the Sears, Roebuck & Co.?

A. Yes, sir.

Q. Where do you reside?

A. 338 East Beverly Boulevard, Pico, California. [2\*]

Q. What is your business or occupation?

A. I am a tool and diemaker.

Q. For how long have you been so employed?

A. All my life, from when I went to work when I was sixteen years old.

Q. Now, I notice that you are wearing a hearing aid. For how long a period of time have you been wearing an aid?

A. I bought my first hearing aid around 1939, 1940, or thereabouts. I don't remember the exact date.

Q. Now, on or about the 13th day of October, 1945, did you have occasion to go to Sears, Roebuck & Co.?

A. Yes, sir.

Q. Which one of their stores did you go to?

A. On Olympic Boulevard, their main store.

Q. What was your purpose in going there?

A. To buy batteries for my hearing aid.

Q. You were wearing a hearing aid at that time?

A. Yes, sir.

Q. What kind was it?                   A. An Acousticon.

Q. Was it an air conduction or a bone conduction type of hearing aid?

A. It was a bone conduction, one I held over my head.

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\*Page number appearing at top of page of original Reporter's Transcript.

(Testimony of Frederick Hartley)

Q. On which side did you wear it?

A. Either side. [3]

Q. Prior to October 13, 1945, had you worn an air conduction hearing aid?           A. No, sir.

Q. Now, will you please tell the court what you did on the 13th of October, 1945, with respect to the purchase of batteries?

A. Well, the wife and I went over to Sears, Roebuck to get some batteries, because we were going to a show and I wanted to be sure my hearing aid would work and the batteries wouldn't run down. So I went in to buy batteries.

Q. What time of the day was it when you went in there?

A. It was between 8:00 and 8:15 in the evening.

Q. What occurred, if anything, about that time?

A. I inquired where the batteries were, and I went over to the place where they sold the batteries and I asked the salesman there to sell me some batteries.

Q. Can you describe the place at which the batteries were located?

A. Well, it was on the first floor, as I walked in, and it said, "Optician Department" or "Optical Department," and I inquired where it was, and they told me, and I went over there and I inquired about the batteries and bought some batteries.

Q. Was the place enclosed or was it open?

A. It was enclosed. It was in the store proper. [4]

Q. I mean within the store itself was it enclosed either by partitions or was it open?

A. Not where I was buying the batteries. That was in a case right on the floor.

(Testimony of Frederick Hartley)

Q. What happened after that?

A. Well, I bought the batteries and the salesman asked me if I had tried the Zenith hearing aid, if I had had a demonstration.

Q. Do you know the person to whom you spoke at that time?           A. Yes, sir.

Q. What was his name?

A. His name was Owen.

Q. Do you know his first name?

A. No, I only know his name by the receipts I got.

Q. Do you know whether he is in the court room at this time or not?           A. He is, sir.

Mr. Moore: Mr. Owen, will you rise, please?

(The person indicated did as requested.)

Q. By Mr. Moore: Is this the gentleman to whom you refer?           A. Yes, sir.

Q. Thank you. Now, will you tell us what happened after that? [5]

A. He told me about the Zenith hearing aid, that it was a wonderful hearing aid, he was wearing one himself, and would I like to try one.

Q. Now, at that point, did you ask Mr. Owen regarding a hearing aid?

A. Well, no. I just walked in the store and I bought the batteries, and there were Zenith batteries and other batteries there, and he asked me if I would like to try a Zenith hearing aid.

Q. Proceed, please.

A. I said, "Why, sure. Where do you try them?" Then there was a little enclosed room there to his left, and he said, "Right in here." So I went in there and he

(Testimony of Frederick Hartley)

tried the hearing aid on me, and he asked me if I was wearing a bone conduction, and I said, "Yes."

Q. Did you have your bone conduction hearing aid on at that time?

A. Yes, sir. So we tried the Zenith hearing aid, and he asked me how I liked it, and I said, "Fine," that I could hear a lot better with it.

Q. In trying on the Zenith hearing aid, what, if anything, was done preliminary to your trying it on?

A. What was it?

Q. Was anything done? Did he just place the aid on your head? [6]

A. We just took the aid and the wires that go with it, the battery, that connect the battery, and lay the hearing aid down, and you put the earphone or earpiece up to your head or ear, whatever the case is.

Q. Was that all that was done?

A. That's all.

Q. What, if anything, further occurred?

A. Well, we got to talking about the different kinds of hearing aids, with bone conduction and air conduction. He said, "Did you ever try air conduction?" I said, "Well, no. I have always had the bone conduction," the one that goes over here (indicating).

Q. Indicating over your head?

A. Over your head, and it is held with a band, and there is a lot of pressure all the time. So I mentioned that it would be nice if I could hear with the air conduction. He said, "Well, Zenith has a standard earpiece, and" he said, "it doesn't—it only costs \$3.00 extra." So I says, "If that is all it costs, I might as well buy that too."

(Testimony of Frederick Hartley)

So I was trying that on, and he says, "Well," he says, "they generally have a mold made so they can hear much better, because it fits your ear." So I decides to have a mold made.

Q. What did you tell him in that regard?

A. I told him I would have a mold made. And I says, "Where do you get them?" He says, "We make them." I asked [7] him if they made them right in there. He said, "We make the impression right here, and you get it in four or five days."

Q. At that time did he tell you how the impression was made?           A. No, sir.

Q. What, if anything, further occurred?

A. Then I decided to have a mold made, and I asked him how much it was. He says, "\$6.00." So I says, "All right, I will buy one."

Q. Now, may I ask you at this point whether the mold was for your left ear or your right ear?

A. It was for my right ear.

Q. What, if anything, had you said to him regarding your right ear?

A. He asked me which ear did I hear best out of, and I told him my left ear. So, naturally I had a mold made of my right ear.

Q. All right. What was done in that regard?

A. Well, he told me to lay my head down on the pillow on the table or on the desk there, and I did.

Q. Was this table in this enclosure that you refer to?

A. Yes, sir.

(Testimony of Frederick Hartley)

Q. Now, did Mr. Owen tell you who he was, or what relationship, if any, he had to Sears, Roebuck? [8]

A. No. He just told me he wears one himself, and he is selling the hearing aid, and that's all.

Q. All right. You say you laid your head down on the table? A. On a pillow.

Q. Will you explain what you did in that regard?

A. Well, I was facing him, like I am facing you now, and he was on my left. He puts a pillow on the table, and I laid my head down, my left side of my head down and face the wall, and from there he started working on my ear.

Q. What did he do in that regard, if you know?

A. I couldn't tell you. My head was down, and I was just letting him do what he wanted.

Q. Well, during the process that went on, did he talk to you? A. Well, yes, he was—

Q. Did he tell you what he was doing?

A. Well, no. He was just walking around there, and I can't remember what the conversation was, what he says.

Q. What, if anything, did you feel?

A. Did I think?

Q. No. What, if anything, did you feel as he was working there?

A. Well, I felt him touching my ear, my head, and that's all. [9]

Q. Did he tell you at that time how he was making the mold? A. Oh, no, sir.

Q. Did he explain to you what it was for?

A. No, sir.



(Testimony of Frederick Hartley)

Q. All right. What happened after that?

A. Well, he got all through, and I says, "Well, that didn't take long." He says, "No." Then I says, "Well, I might as well have one made of the other ear too, so I can change off." I said, "Would that be a good idea?" And he says, "Yes."

Q. At that time did you see any mold?

A. Well, I can't recollect it now, because I have seen the one they sent me. I don't remember whether I seen it when I was there or not. I just didn't notice.

Q. All right. Now, what happened?

A. Well, then he says, "Well, it is getting late. We haven't much time," he says, "but if we hurry up, we can get through in time. It is getting late."

Q. Did he say what time they closed?

A. He said at 9:00 o'clock they closed.

Q. Do you know what time it was when you had this conversation regarding hurrying up?

A. No. What time it was, exactly the right time?

Q. Yes. [10] A. Oh, no.

Q. Approximately?

A. I wouldn't—I couldn't tell you.

Q. Then what was done?

A. Well, then I went on the other side of the desk, and he put another pillow there, and I laid the right side of my head on it, and he went through the same procedure he did with the right ear.

Q. Did you feel anything at that time?

A. The only thing, when he put it in the left ear, I felt it was warm here (indicating). It was a little different from in the right ear.



(Testimony of Frederick Hartley)

Q. You are pointing just below your ear?

A. I felt it down here (indicating).

Q. Just underneath your ear? A. Yes.

Q. Do you know what, if anything, he was placing in your ear? A. No, sir.

Q. All you know is that it felt warm; is that correct?

A. Yes, sir, it felt warm.

Q. Did you say anything to Mr. Owen at that time about it feeling hot? A. No.

Q. What next occurred? [11]

A. Well, then we waited a minute or so, and in the interim the telephone rang, or something, and he was going out while he was working on me, and he came back, and I said, "You are quite a busy man." He says, "Yes." He made a remark that he was awfully busy.

Q. Did he leave you more than once?

A. About twice. At least twice.

Q. How long was he gone on each occasion?

A. About a minute or two.

Q. All right. What next occurred?

A. Well, then like I said, he came back and poured this stuff in my ear, and it felt a little warm, and that's all. I didn't know whether it was all right or not. I didn't make any comments or anything, and then he must have took them out and laid them out, and, as I say, I can't recollect.

Q. Did he do anything with respect to your ear after this warm sensation?

A. He just waited a while, and I could feel him pulling something out.

(Testimony of Frederick Hartley)

Q. Had you felt something on the right side, when he worked on your right ear?

A. Well, practically the same thing, yes.

Q. Do you know what he pulled out of your left ear?

A. No. I assumed it was a mold or an impression.

Q. Well, immediately following his pulling this out [12] did you observe what he had?

A. No, I just—he put it down on the table and said, “Well, there they are.”

Q. And what did you observe on the table?

A. I didn’t take much notice. I just seen like a bunch of clay, or something; a cast.

Q. What color was it?

A. Well, it appeared white. I don’t know. I couldn’t—

Q. You say it looked like clay?

A. Clay, or—

Q. Did you touch it?           A. Oh, no.

Q. Did he tell you what they were?

A. He said they are impressions. He said, “We will send these away to the laboratory, and in about four or five days you will get your earpiece.”

Q. How many of them were there?           A. Two.

Q. All right. Then what occurred?

A. Well, then he said that was all, so—

Q. May I ask you this: Was your wife present at any time during this process?

A. Well, I asked him how much it was going to be. So the hearing aid was \$50.00, and the extra piece for the air conduction was \$3.00 or \$3.50, and taking an impression of my [13] right ear was \$6.00, so that it come to \$59.00 or \$60.00. So we didn’t have our check book or any way to pay him. So we asked him how could we

(Testimony of Frederick Hartley)

pay them. He said, "If you have a checking account, you can go up to the office and they will give you one of the checks, and you can make it out." So my wife went up and made out a check for \$60.00.

Q. And was she gone while the impressions were being made?      A. Yes.

Q. This earpiece that cost you \$3.50, what was that?

A. Well, you see, they sell you an earphone for \$50.00, with either one, a bone conduction or a thing to put in your ear for air conduction. So I took the \$50.00 one with the bone conduction, and then paid him the extra \$3.50 to get the both of them.

Q. But what is this earpiece you refer to?

A. It is just a little piece of plastic with a rubber on it that anybody can use or stick it in their ear. It is just a conventional piece.

Q. Do you have one at this time?

A. Oh, no. I got one home. I never used it.

Q. All right. Now, when you were through did your wife return?

A. Well, while she was gone and made the check out, I decided on having the other one made and we paid him cash [14] for the other one. When she returned we were practically through with the fitting.

Q. Had the store closed as yet?

A. Oh, no. He says, while he was making out the bills and we were paying him, he says, "We haven't got much time. If we don't hurry up, all the lights will go out in the place," and he says, "then we won't be able to see what we are doing."

(Testimony of Frederick Hartley)

Q. Now, at that time did you have the sensation that you experienced in your left ear continue, that of being warm?

A. Well, on the way out I remarked to my wife, I says, "This side feels funny, just like as if I was out swimming and it feels like I got water in my ear." And I kept tapping my head to see if I could clear it up.

Q. Are you pointing to the same place below your left ear that you did when you described the warm sensation?

A. No. It was in there, and it felt like it was all blocked up.

Q. I say, You are pointing to the left side, are you?

A. Yes.

Q. Did you tell Mr. Owen at that time about the sensation?

A. Oh, no. It was after I left him that I kind of felt that. I didn't have much time to tell him. We had to get out of there.

Q. While you were observing these two clay-like molds [15] on the table did you notice whether anything was attached to them or not? A. I couldn't say.

Q. To the best of your recollection?

A. Well, no. I just noticed them there, and like I said, I didn't take particular notice.

Q. Now, had you had any molds made for your ears prior to October 13, 1945? A. No, sir.

Q. I believe you said you had not had an air conduction hearing aid prior to that time?

A. No, sir.

(Testimony of Frederick Hartley)

Q. Prior to October 13, 1945, had you been able to hear without your hearing aid at all?

A. Oh, I took it off occasionally, when it was—when I didn't have company, or nobody was around, because the pressure, it kind of makes your head sore. So I used to take it off a lot when I would be alone, or with my wife at home, or something.

Q. What, if anything, did you hear without your aid?

A. Well, I couldn't hear everything, but I could—my wife could make me hear her by shouting and talking loud to me.

Q. Do you know how close to you she would have to be in order to make you hear, that is, prior to October 13th? [16]

A. She could be in the same room with me or just step into the next room and talk in a loud voice, and I would hear.

Q. Now, you have indicated that you told Mr. Owen that in your right ear your hearing was not as good as in the left. Upon what did you base that statement?

A. Well, from the first time I noticed I was getting hard of hearing. I went to bed one night and set the alarm clock, and in the morning I didn't hear it go off, and I didn't hear the clock, and I was laying on my right ear, and I jumped up to shake the clock, and when I jumped up I heard it. I did that a couple of times, and then I remarked to my wife, "Gee, I am losing my hearing; my hearing in my right ear."

(Testimony of Frederick Hartley)

Q. Now, what occurred after you left Sears, Roebuck & Company store on October 13, 1945?

A. Well, on the way home we went to a moving picture show.

Q. What, if anything, did you notice with respect to your ear?

A. Well, I tried—I had the new hearing aid in the box, and I was trying to see how I would hear by putting the plug in that comes with the hearing aid in my ears. And if I put it in my right ear, I could hear a little, but not too good, and when I put it in my left ear, I didn't hear thing. And I told my wife, "Gee, these things are no good. I can't [17] hear anything." So I used my old one then, the one I had before.

Q. When you left the store, you indicated you felt a sensation on your left side as if you had been in swimming. Did that condition continue?

A. Well, I went to the show, and it felt like—just the same way like I told you, and it felt that way that night, and I went home and went to bed. Then when I got up the next morning—

Q. What time did you get up the next morning?

A. What time?

Q. Yes.

A. Oh, about 9:00 o'clock; Sunday morning.

Q. Had you felt anything during the night?

A. No, I slept alright.

Q. All right. Proceed.

A. And I got up, and there was a funny feeling, like I was enclosed, you know, like in a stuffy room. I didn't feel like I always felt.

(Testimony of Frederick Hartley)

Q. Where was that stuffy feeling?

A. Well, in my head.

Q. On which side?

A. Well, it just felt like I wanted to get out or get away from something. So I asked my wife to look in my ear.

Q. You keep touching your left ear. Do you mean by [18] indicating that that you felt it on your left side?

A. Well, yes.

Q. And did your wife look into your left ear?

A. Yes, sir. I laid my head on the table, and she looked in it while we were eating breakfast.

Q. Do you know what she found, if anything?

A. She said it was all stopped up.

Mr. Wheeler: If your Honor please, I submit that this is hearsay, this conversation as to what his wife told him she found upon examination of the ear.

The Court: Yes, I think so. That would not be a part of the *res gestae*.

That was the day following, was it not?

The Witness: Pardon me?

The Court: That was the next day, wasn't it?

The Witness: That was the next morning.

The Court: Was that Sunday morning?

The Witness: Sunday morning.

The Court: Objection sustained.

Q. By Mr. Moore: What, if anything, did your wife do with respect to your left ear?

A. Well, I asked her if she could see anything.



(Testimony of Frederick Hartley)

Q. The judge has ruled that the conversation between you is not admissible. Did your wife do anything with respect to your left ear? [19]

A. Well, she got a bobbie pin and went inside to touch it and said it was all hard in there.

Q. Did you hear anything yourself when she went in with the bobbie pin?

A. Yes, it felt like a stone wall.

Q. Then what, if anything, did you do?

A. Well, she wanted me to go to a doctor, to try to get it out.

Q. Did you go to a doctor that day?

A. I didn't know of any doctor, didn't know where to go.

Q. Did you go to the doctor that day?

A. No.

Q. All right. Was your ear bothering you at all?

A. Oh, yes.

Q. What sensation, if any, did you have?

A. Well, it wasn't a bad pain, but it was something that I felt, like I wanted to get out of there.

Q. All right. Did you go to a doctor at all?

A. The next day.

Q. On Monday?           A. On Monday.

Q. October 15th?        A. That's right.

Q. Prior to the time you went to the doctor, did you continue to feel the sensation you refer to? [20]

A. Oh, yes. My boss called me up, and I had to go up to my place of employment on Sunday to work on a job, get a job going, and I told him, I says—



(Testimony of Frederick Hartley)

Q. My question was: Did you continue to feel the sensation as if something was bothering you?

A. Oh, yes, it was bothering me.

Q. And then you went to a doctor on Monday?

A. Yes, sir.

Q. To whom did you go?

A. To Dr. Ghrist in Glendale.

Q. At what time of day did you go to him?

A. I had an appointment at 2:30 in the afternoon.

Q. How was your ear feeling at that time?

A. Well, it was getting—feeling like it had something in there and I wanted it to come out.

Q. Did you see Dr. Ghrist?           A. Yes, sir.

Q. What, if anything, did he do for you?

A. Well, I waited for a while, and then he called me in his office, and he asked me what happened, and he looked in my ear, and he said, "Mercy."

Q. Did you tell him what had occurred?

A. Yes.

Q. And after looking in your ear what else did he do, if anything? [21]

Q. Well, he says ever since he left medical school he never had any use for some tools that he brought out to get this stuff out. He said he never thought he would ever get to use them, but he said now they would be coming in handy.

Q. What, if anything, did he do?

A. He tried for about a half an hour to get it out and couldn't get it out.

Q. Did you observe what he was doing?

A. What?

(Testimony of Frederick Hartley)

Q. Did you observe what he was doing?

A. No. There was a couple of nurses holding my head. I had my head down on the side, and they were holding it.

Q. Did you feel anything in your ear?

A. My left ear.

Q. What did you feel?

A. Well, he was digging in there, trying to get this obstruction loose. Then he told me to go sit down and wait, and let me wait around there.

Q. What, if anything, else occurred?

A. Then in about a half an hour he poured some stuff in, and about a half an hour later he started working on me again. He had a few other patients in, and then he started working on me again, and in all that time he kept working and kept digging, and I broke down, I couldn't stand the pain any more [22]

Q. Well, what occurred?

A. He said I have to go to the hospital.

(Witness weeping.)

Q. Well, did you go to the hospital that day?

A. No, the next morning at 7:00 o'clock.

Q. All right. Did your ear bother you during the night?

A. Well, sure. He made it hurt.

Q. So then the next day you went to the hospital, and what, if anything, was done? Where did you go? Which hospital?

A. Physicians and Surgeons Hospital in Glendale.

Q. What, if anything, was done there, and by whom?

A. Well, I went there and I went to the desk and told them I was sent by Dr. Ghrist, and they put me to bed.

(Testimony of Frederick Hartley)

The Court: I think it is about time for our recess. Mr. Moore, we will take our morning recess.

Ladies and gentlemen, we will take a recess for a few minutes, five or ten minutes; not to exceed that, Mr. Bailiff.

During the recess, and whenever you separate from one another, in the jury box and during the trial of this case, do not talk about the case or suffer yourselves to be spoken to or approached by any person concerning the case or anything involved in the trial of the case, and do not form or express any opinions on the case until it is finally submitted to you. Please occupy the jury room, ladies and gentlemen, during the [23] recess.

(A short recess was taken.)

The Court: All present. Proceed.

Mr. Moore: Miss Reporter, will you please read the last question and answer?

(The record was read.)

Q. By Mr. Moore: What happened then, Mr. Hartley?

A. They gave me something to take, with a needle, and put me on an operating table; a wheel-chair, you know, a thing they lay you down on and wheel you out.

Q. Then what occurred?

A. I don't know. I went out.

Q. When you came to, where were you?

A. Well, I was at the same place. I thought I was going to get up and go home, and I got up and thought it was dinner-time and it was the next morning. I didn't remember anything until the next morning, you know, everything was—well, I got up and fell down, and went

(Testimony of Frederick Hartley)

back to bed, and they told me I had been asleep all the time, the other patients.

Q. This was on Tuesday, the 16th, you went to the hospital? A. Yes.

Q. And when you refer to the next morning, that is Wednesday, the 17? A. The 17th. [24]

Q. When did you leave the hospital?

A. The same day, at noon-time.

Q. On the 17th?

A. I went to the hospital on a Tuesday, and I left the next day around noon-time, on a Wednesday. I had to wait for the doctor to come and discharge me.

Q. How did you get home?

A. I drove my car. I went to the hospital myself and went home myself.

Q. Now, how did your ear feel when you left the hospital?

A. Well, when I got up in the morning in the hospital the pillow was all blood, and it was just, you know, like a dull ache.

Q. Now, how long did you continue to have trouble with your ear?

A. Well, I had to keep going to the doctor. So about two or three days after the operation I went back to the doctor.

Q. When you say "the doctor" you mean Dr. Ghrist?

A. Dr. Ghrist, yes. And he says, "How do you feel?" I says, "I am dizzy. I feel like everything is going around."

Q. Did you feel dizzy when you left the hospital?

A. No. Well, I didn't feel good.

(Testimony of Frederick Hartley)

Q. When did this dizziness first come on?

A. Well, I can't remember. You know, I was all upset.

Q. But at the time you went to the doctor two or three [25] days later you were feeling dizzy, were you?

A. Yes.

Q. What other sensations, if any, did you have?

A. Well, the ear was paining. Naturally, it ached, but I could stand it.

Q. Were you taking anything?

A. No, only when I went back he looked in and he says, "You have got an infection now."

Q. That is when you went back the first time?

A. Yes.

Q. What, if anything, did the doctor do at that time?

A. He just looked in there and gave me a prescription for sulfa drugs, and told me to take them.

Q. Did you purchase the sulfa drugs?

A. Yes.

Q. And did you take them?                      A. Yes.

Q. All right. When did you see the doctor again?

A. Well, he kept—you know, he told me like—I don't remember the days, but he said about three or four days later I had to go back again.

Q. Did you go back?                      A. Oh, yes.

Q. What, if anything, did he do for you at that time?

A. Just looked in there. [26]

Q. How did you feel between the time of your first visit to him and your second visit to him, after you came home from the hospital?

A. Well, it started—my ear stopped running, and it felt closed up again.

(Testimony of Frederick Hartley)

Q. Did that condition of running stop for a while, and then start again?

A. It stopped, yes. Then he looked at it and he says, "It is coming along pretty good."

Q. How many more times did you go to Dr. Ghrist?

A. I kept going, I can't remember, about four or five times I kept going to him.

Q. Over what period of time? Over how long a period of time?

A. About two to three weeks.

Q. During that time how did you feel?

A. Well, about five or six days after the operation my ear started to bother me again, and so—

Q. When you say "bother me," what do you mean?

A. Well, my head started to fill up and my ear started hurting again, and the doctor—I could not get the doctor. He was gone away, or something, and I didn't have an appointment until about Monday, and so I didn't know what to do, see, and so I went and took some more sulfa drugs because I thought the infection was coming again. I could not get the doctor, [27] and so that would be like on a Thursday that I couldn't get the doctor, and so on that Saturday night something seemed to bust in my ear, like it opened up, and then it started to run again all over the pillow, and then I felt all right.

Q. Then that seemed to relieve the situation?

A. That relieved it.

Q. How long did it continue to run on that occasion?

A. Did it run?

Q. Yes.

A. Well, I went to bed, and when the stuff was coming out I felt better.

(Testimony of Frederick Hartley)

Q. How long did that running occur?

A. Just about one night and part of the next day.

Q. Did you see the doctor after that?

A. Yes. I felt good then.

Q. About how long was that after leaving the hospital?

A. Well, that might have been Monday right after that Saturday night; then Sunday, and I think it was about Monday or Tuesday. I don't remember.

Q. About how many days or weeks after you left the hospital was the occasion of the breaking in your ear?

A. Oh, that happened about—oh, about seven or eight days after the operation.

Q. Then did you see the doctor any further after that?

A. Oh, yes, about three or four more times. [28]

Q. What, if anything, did he do to you each time you went there?

A. Never done anything; just looked at it.

Q. Did he give you any other medicine, other than the sulfa?

A. No. He told me not to take any more sulfa drugs.

Q. Do you recall of your going to him any further now?

A. No. He told me not to come back, but I never went back to him because—

Q. Do you recall approximately the date of your last visit to him?

A. No, I don't remember. I didn't mark it down.



(Testimony of Frederick Hartley)

Q. Now, do you know how much you spent for your medicine?

A. Well, the first time my wife bought them, and I think it was about \$1.00 for the pills, and then I bought another dollar's worth after that.

Q. \$2.00 for your medicine? A. Yes.

Q. Did you have an anesthetist in the hospital? Do you know whether you had a person, a doctor or a person who gave you an anesthetic?

A. Yes. I got a bill for \$20.00 for some lady doctor that gave me an anesthetic.

Q. And did you pay that? [29] A. Yes.

Q. And did you receive a bill from Dr. Ghrist?

A. Yes.

Q. What was the amount of that bill?

A. \$45.00.

Q. Have you paid that? A. Yes.

Q. Did you have a hospital bill at the Physicians and Surgeons Hospital?

A. I had to pay before I went in.

Q. What was the total amount of that, if you knew?

A. I think I paid \$20.00 going in, and a couple of dollars coming out.

Mr. Moore: Excuse me, your Honor.

(Thereupon, certain documents were handed to opposing counsel.)

Mr. Wheeler: I will stipulate to that, counsel.

Mr. Moore: The two receipts, your Honor, total \$24.06.

The Court: That is the hospital bill, is it?



(Testimony of Frederick Hartley)

Mr. Moore: That is the hospital bill, yes. I am going to have the doctor here this afternoon, who can verify the doctor's and the anesthetist's bill.

Q. By Mr. Moore: After the last time that you saw Dr. Ghrist, did you have any further trouble with your ear, your left ear? [30]

A. After the last time?

Q. Yes.

A. Well, just an annoying feeling, but I figured it would get better by itself.

Q. What do you mean by that type of feeling?

A. Well, when I was all through and I got the stuff out, and he told me I was all right, he told me, "You are all better now," and he says, "You can come back in a couple of weeks and let me look at it." So then all I have is a little, you know,—I have a feeling over here (indicating) all the time.

Q. You are indicating by running your hand over your hair?

A. Like a fly, or something, was bothering me all the time.

Q. When did that sensation start?

A. It started right after.

Q. You mean right after the incident you have referred to on October 13th?

A. After that, sure.

Q. And how long did it last?

A. Up until about five or six weeks ago. It didn't bother me. Just that annoyed me is all; no pain.

Q. Was that over your left ear?

A. Yes, right here (indicating). [31]

(Testimony of Frederick Hartley)

The Court: He puts his hand over the parietal region of the head. Is that correct, Mr. Wheeler?

Mr. Wheeler: Yes, your Honor.

Q. By Mr. Moore: Have you felt anything else since the last time you went to the doctor?

A. No, sir.

Mr. Moore: That is all.

Cross-Examination.

By Mr. Wheeler:

Q. Mr. Hartley, you stated that you are a tool and diemaker, are you? A. Yes, sir.

Q. What type of dies,—what type of work does that involve? A. What type of work does it call for?

Q. Yes.

A. Well, anything that is fabricated has got to have tools made in order to fabricate it, if it is out of metal or any kind of plastics, or anything.

Q. And what is your particular specialty?

A. I can't hear you. You will have to talk louder.

Q. What is your particular specialty?

A. Diemaker; tool and diemaker.

Q. Well, do you make any particular type of dies, or all types of dies? [32]

A. All types of dies. Right now I am making plastic dies, for plastics.

Q. During your experience you have made dies out of metal, have you? A. Metal.

Q. And dies out of plastics?

A. No, I make dies to make plastics.

Q. Then all of the dies you make are made out of metal? A. Steel.

(Testimony of Frederick Hartley)

Q. Steel. And what particular type of dies are you making or for what kind of products at the present time?

A. At the present time?

Q. Yes. A. For thermostatic plastics.

Q. And what type of a die would you make?

A. What type would I make?

Q. Yes. What would you make for that instrument?

A. Well, I could make anything that is put before me, or if you want to make any kind of an article, I make a die to make that article.

Q. A die is similar to a mold, is it not?

A. No.

Q. What is the difference?

A. Well, a die, they use that for production.

Q. Yes. [33]

A. And in order to make a die for a mold, it is like anything else, you have got to make a finished article backwards, in other words.

Q. Yes.

A. And there has got to be ejections, and there has got to be feers, and it is quite a study. And there is all kinds of things come up that you have to know, so as to make them out of steel.

Q. What do you make the die from?

A. What do me make it from?

Q. Yes. Suppose you have a product you want to make and you want to make a die for it, how do you go about it?

A. Well, you got—you just make a mold. You make your die, and you figure it out, you lay it out, and figure whether it can be molded or not, and you rework the product in order to make your mold and make your die.

(Testimony of Frederick Hartley)

Q. First you make a mold then, do you?

A. No.

Q. What do you do to make your die?

A. What do I do to make the die?

Q. Yes.

A. First, you have got to get your steel, and you have got to machine all your steel up. Then you have to make your cavity, then you have to make cores, and you have to see that the die works together, that it is all automatic, [34] that it closes and it opens, it ejects, that it takes the pieces and is ready for the mold all in one operation.

Q. Well, do I understand you then that you do not make a mold from which you make the die?

A. No, sir.

Q. How long have you been doing this type of work?

A. Well, that is my trade. All my life since I was 16 years old, and I am 47 years old now.

Q. You are presently employed where?

A. At the Muntz-Sparks Company. That is the Muntz-Sparks Tool and Die Company at Pasadena.

Q. And it is at that plant that you make the dies for plastic material?

A. I make the dies in the machine shop and they go to another factory, where they take the dies and they eject plastics from the dies so that it makes a thermostatic plastic.

Q. You are interested in that line of work, are you not?

A. Yes, sir.

Q. And interested in the problems that arise in the making of dies?

A. That's right.

Q. What is your job rating, or what is your position?

A. My position at the present time?

(Testimony of Frederick Hartley)

Q. Yes.

A. I am foreman. I am the foreman of the die shop.  
[35]

Q. And does that involve supervision of work of other men?

A. That's right; supervising the work, laying it out, and seeing the men do the work right.

Q. Now, prior to your employment at this place in Pasadena, where were you employed?

A. I was employed—just before that I was in business for myself, making dies; hiring machinery and making dies for the same people I am making them for now.

Q. So you have been in this business,—I mean on your own and in the capacity of—

A. Of having people, and before that I worked for Wilcox Plastic Company.

Q. Where is that?

A. That is in East Los Angeles on Goodrich Boulevard.

Q. And you were a tool and diemaker there?

A. That's right.

Q. Were you a foreman in that place?

A. No, I wasn't a foreman; just a tool and diemaker.

Q. Now, you stated, I think, that the first time that you noticed that you were losing your hearing was sometime when you had an alarm clock and you wound the alarm clock and couldn't hear it run?

A. That's right.

Q. When was that incident? [36]

A. When?

Q. Yes.           A. Approximately?

(Testimony of Frederick Hartley)

Q. Yes.

A. Oh, around 1934, '35, or '36, somewhere around there.

Q. And did you notice after that that it became increasingly difficult for you to hear?

A. Oh, sure. Not too bad. I kept getting hard of hearing.

Q. In other words, it became more difficult for you to hear as time went on?

A. Yes, people kept asking me, "Don't you hear me?" And I didn't hear them.

Q. You found that you weren't hearing what people said to you?

A. Only what they told me, that they talked to me. I only hear what I heard. You know, if people talked to me, I heard them, and if I didn't hear them, I couldn't. I wouldn't know whether I heard them or not. I don't know.

Q. Did you at any time notice whether there were any particular types of people that you couldn't hear?

A. I wouldn't know. Just people kept shouting at me and telling me I was—

Q. And when they shouted at you, did you hear them?  
[37]

A. Why, sure, if they talked loud.

Q. Where did they have to stand?

A. When was this? Where did they have to stand when?

Q. When they shouted at you so you could hear them.

A. Well, I wouldn't know they was shouting. They would just tell me they were talking loud.

(Testimony of Frederick Hartley)

Q. I see. Now, when did you first start to wear a hearing aid?

A. Well, I went to the Veterans Hospital in 1938 and they told me that it was nerve deafness, or something, and it was just the right ear. I went to get a repair on my side, and then I kept, you know, having difficulty hearing people, and, you know, people passing remarks, so I bought a hearing aid. That was around 1939 or '40.

Q. And what type of hearing aid did you buy?

A. A Western Electric carbon set.

Q. Did you have any difficulty in hearing after you used that hearing aid?

A. I didn't use it much.

Q. When did you use it?

A. Well, whenever I wanted to hear, make sure I wouldn't miss anything, like if I go to a meeting or if I thought I would need it; you know, like if I would go to a hall or there would be a meeting, or a show, or I really wanted to hear good, I would wear that. [38]

Q. Did you wear it at work?           A. No.

Q. Did you wear it at home?

A. Well, only when my wife would tell me to put it on and say, "Why did you buy it for, if you don't wear it?"

Q. When did you get the next hearing aid?

A. Well, I came out to California in 1941. I had that hearing aid. Then I was called back East to take over a factory back there, supervise a factory. Well, I went back there and got a pretty good job as superintendent of a factory. So then I had to meet people and talk to people, so I decided to buy another hearing aid, because they were coming out with a vacuum tube hearing



(Testimony of Frederick Hartley)

aid at that time. So I thought I would try that, so I bought an Acousticon.

Q. And did you use that hearing aid all the time?

A. From that time I started to wear it most of the time, yes.

Q. And since 1941 you used the hearing aid?

A. Occasionally.

Q. All of the time?

A. No, since 1942, after I bought the Acousticon, I used it practically continuously. I didn't like the other one. It was too noisy. It bothered me.

Q. It was the type of hearing aid that caused you not to use the first one as frequently as you required? [39]

A. Well, yes. It was noisy, made a lot of noise, and you would only hear it when you were standing up and wouldn't work—it was a carbon set and you had to be in a certain position.

Q. Now, this Acousticon was a bone conduction?

A. That's right.

Q. What is the principle involved in the bone conduction type of hearing aid?

A. Well, with a bone conduction you can—well, the way the doctors tell me—

Q. Well, do you know yourself?

A. Yes. You have three ears, you have an outer ear, an inner ear and a middle ear, and if you have a good bone conduction, you will never be deaf, and I have a good bone conduction. Doctors tell me I can hear better with bone conduction than a normal person can, that I am above normal. That is, by putting it on my forehead, either side, or my teeth, either side, I can hear anything, I can hear a pin drop. That is with bone conduction. And



(Testimony of Frederick Hartley)

with bone conduction you just put it on the mastoid bone, and it is like a telephone, and it jumps the outer ear and middle ear to the inner ear that makes you hear, and in between the two ears—you know, the doctors tell me and you read pamphlets all about the mechanism of the ear, the anvil and all that stuff, and that is what makes a person hear. So I can hear good through [40] bone conduction, and if I put my head here on the wood, and I brace it, I can hear that way.

Q. Have you ever had any examination before for air conduction?           A. Did I ever have any?

Q. Yes.           A. Yes, sir.

Q. Where did you have those examinations?

A. Well, in different places I went when I bought the Western Electric and I bought the Acousticon. The Acousticon people, they always gave me an examination, an audiograph, to see how bad I was.

Q. For air conduction?

A. To find out how hard of hearing I was. When you are hard of hearing they give you an audiograph to test your hearing, to see what degree the loss of hearing is, and they tell you. And when they put the bone conduction on, they always told me I had marvelous bone conduction. So they always sold me one of those things that come around here (indicating). So I was wearing them, and I went to buy batteries at the Acousticon Institute, that is one of their offices, and there was a so-called expert there, and he says, "Well," he says, "can you hear with an air conduction?" I says, "Well, I don't know. I never tried it, you know."

He says, "Well," he says, "the theory is," that was his [41] theory he said, "you know you could save your

(Testimony of Frederick Hartley)

hearing from getting any worse by using an air conduction." He said that revives a nerve, or something.

Q. That was just some conversation you had?

A. That was in the conversation. That is mostly the reason I thought I would try this and get that pressure off my bone all the time.

Q. The air conduction is more convenient and has less pressure on your head?

A. Yes. I can't hear as good with air conduction as I can with bone conduction.

Q. Had you ever tried a Zenith machine before?

A. Only one time. When I went to buy batteries in Pasadena, when they were hard to get and they had them in an optical place there, they just showed them to me, and I put it on, and I just seen it there, that's all.

Q. Now, when you tried the Zenith on the night of October 13th, can you describe the earpiece that was used?

A. Could I describe the earpiece that was demonstrated to me?

Q. Yes.

A. Well, when you buy a hearing aid they always tell you that you have to have a molded earpiece, if you have an air conduction, but Zenith advertises that you don't have to buy anything, that they have a plug, a conventional plug that will [42] fit anybody's ear with some kind of a rubber adapter that will fit on your ear, and fit anybody's ear. So that is the reason I paid the \$3.50 extra, in case I wanted to try the air, that I could stick that thing in and see if I could hear. So then I was sold on the idea that night to have an ear mold made at the same time, which would run \$6.00 and that they

(Testimony of Frederick Hartley)

did it right there and I didn't have to go to a doctor or dentist, or anything. That is the reason I got it.

Q. Now, do you have these earpieces that were made for you at that time?           A. Do I have any?

Q. Yes.

A. I am wearing one and I got one in my pocket.

Q. You have the one in your pocket for your left ear?

A. The left ear, it is broke off. It broke off short. That's the same as the plastic thing they took out; the impression is the same as that. That is the way I got it.

Q. Well, this is the earpiece that was sent to you by Sears, Roebuck & Co.?

A. To wear with the hearing aid, to make me hear better.

Q. Where is it broken?

A. Right here (indicating) it is not complete. That is where it ended. That is where it broke when he was taking it out. It shows up on the cast too.

Mr. Wheeler: If your Honor please, for the purpose of the [43] trial, subject to the right of withdrawal, I think that it is important to have this as a part of the exhibits. I therefore offer it in evidence as Defendant's Exhibit 1.

Mr. Moore: I have no objection, your Honor, provided we also have the plaster molds, which I understand were delivered to your Honor.

The Court: Yes. The court has them, I think.

The Clerk: Yes, your Honor.

The Court: It will be marked as an exhibit. Just where is the break?

(Testimony of Frederick Hartley)

The Witness: Your Honor, do you mind if I take this one out?

The Court: No.

The Witness: Then I can't hear.

(Witness removes earpiece from ear.)

The Witness: You see, this here (indicating) goes right inside my ear, you know, way in, and this one here, it stops. It stops about here (indicating), and if you put them down, you can see the height. See?

The Court: Can you hear me now?

The Witness: Yes, sir.

The Court: I understand you to say that this was broken, this set?

The Witness: If you compare them, you will see.

The Court: Wait a moment, please. Will you mark that? [44]

The Clerk: Defendant's Exhibit A.

(The article referred to was marked Defendant's Exhibit A, and was received in evidence.)

The Court: You said that Defendant's Exhibit A was broken?

The Witness: No, it is cut off short. That is the one that was broken off.

The Court: I see what you mean.

The Witness: This one has not broken off.

The Court: Not that it was broken, but that it was made short.

The Witness: By looking at it, from my ability as a mechanic, after getting them both, because I am a mechanic I saw that. So if you put that there, you will

(Testimony of Frederick Hartley)

see this is about an eighth of an inch higher than this one (indicating). So that if you actually put anything in a hole like this, and it is not hooked under here—your Honor, look, you can pull it out. But if it is hooked, you can't. So when it was pulled out, it had to go some place.

The Court: I think I understand.

The Witness: You understand, it had to go some place. You couldn't pull that, but you could pull this.

The Court: Proceed, Mr. Wheeler.

Mr. Wheeler: May the plaster molds be marked as exhibits also, your Honor, and be introduced as Defendant's Exhibits [45] B and C?

Mr. Moore: No objection, your Honor.

The Court: So ordered.

(The articles referred to were marked as Defendant's Exhibits B and C, and were received in evidence.)

The Court: I will state that Exhibits B and C are the instrumentalities that were delivered to the judge on yesterday in compliance with the pre-trial order, and were this morning delivered by the judge to the clerk.

Mr. Moore: Counsel, may it be stipulated that these are ear molds that were turned over to you by counsel for the plaintiff, and I believe they have been identified by the laboratory and by yourself as being the molds that were made for Mr. Hartley.

Mr. Wheeler: That is correct. I will stipulate that these are the molds that were made for Mr. Hartley, with the reservation—I mean, subject to the explanation that they are not at the present time in the exact con-

(Testimony of Frederick Hartley)

dition as at the time when they were taken out of Mr. Hartley's ears.

Mr. Moore: That is true. As I understand it, there were certain markings put on by the laboratory, and coloring, that were not originally on there.

Mr. Wheeler: That is correct.

Mr. Moore: And that one of them was broken in mailing and was put together by the laboratory. [46]

Mr. Wheeler: That is correct.

The Court: So understood. These exhibits may be shown to the jury later on.

Mr. Moore: Yes. I wonder, counsel, if we can identify either Exhibit B or Exhibit C as being the counterpart of Exhibit A?

Mr. Wheeler: If the witness can do so, we can do it right now. If he can't, I will do it later.

Mr. Moore: All right.

Q. By Mr. Wheeler: Showing you defendant's Exhibit C, Mr. Hartley, I will ask you to compare that with the ear mold or ear piece, rather, which is Defendant's Exhibit A, and ask you if the ear mold is the same as the earpiece?

A. Is this the same as that (indicating)?

Q. Yes.

A. Well, they are both different materials.

Q. Yes, but I mean as to the shape and form, does one appear to be the same in shape and form as the other?

A. That's right. If you will prepare this, you will get this from that (indicating).

(Testimony of Frederick Hartley)

Q. Upon examination of Defendant's Exhibit B, I will ask you if that appears to be identical with Defendant's Exhibit A.

A. Of course not. It is obvious that this here is complete. [47]

The Court: Mr. Hartley, pardon me just a moment. Will you refer to these exhibits by the letter rather than by "this" and "that" for the record? If any one wants to read this later on, it will not be clear at all and they will not be able to know what you are saying.

The Witness: A. Well, these two pieces are opposite. These are the same.

The Court: You are now referring to one that has become detached. I presume that is Exhibit A that you are referring to?

The Witness: Yes.

The Court: That is Exhibit A. And this is Exhibit B, as you will see by the letter, and this is Exhibit C. Now, make the comparison which you made when you said "this" and "that."

The Witness: Well, Exhibit A is the same form as Exhibit C.

Q. By Mr. Wheeler: And it is not the same form as Exhibit B? This is Exhibit B?

A. No, it is not the same form.

Q. In other words, Mr. Hartley, then Defendant's Exhibit C is the mold from your left ear?

A. That's right.

Q. And Exhibit B is the mold from your right ear?

A. Right ear. [48]

Q. And A is the earpiece for your left ear?

A. A is the earpiece for the left ear.



(Testimony of Frederick Hartley)

Q. Now, so I can clearly understand it, this mold, or, I mean the earpiece that you have is not broken, or, I mean it is in the same condition as you received it?

A. Yes. I hadn't touched them.

Q. The earpiece I am referring to now.

A. The one I have got in my ear now?

Q. Yes.

A. That is the same as I got it when they mailed it.

Q. And the earpiece for your left ear, which is Defendant's Exhibit A, is in the same condition as when you received it? A. That's right.

Q. This statement of yours with reference to its being broken is a conclusion of yours which you drew from an examination?

A. From an examination of the two pieces, yes, sir.

Mr. Wheeler: If your Honor please, I move that the testimony as to Defendant's Exhibit A being broken be stricken on the ground that it is a conclusion of the witness, and, therefore, should be disregarded.

The Court: I think it should not be disregarded, but the jury heard the examination of the witness by the court on that point, and they will have a right to inspect these two objects [49] so as to determine whether or not the nomenclature, the description, or the use of the word "broken" was the proper appellation.

Mr. Moore: Your Honor, may I be excused for just one minute? I have some papers which were brought up to me.

The Court: Yes.

Mr. Moore: Thank you.

The Court: With that statement, the motion is otherwise denied.

(Testimony of Frederick Hartley)

Q. By Mr. Wheeler: With reference to the purchase of these earpieces on October 13th, Mr. Hartley, had you ever been in that department prior to this evening?      A. No, sir.

Q. You had never met Mr. Owen before?

A. No, sir.

Q. Now, you stated that you went to the department at about 8:00 to 8:15 of that evening?

A. Did I what?

Q. On that occasion you went to the department where these hearing aids were sold at about 8:00 to 8:15 in the evening, did you not?

A. Between 8:00 and 8:15 in the evening?

Q. Yes.      A. As near as I can recall, yes.

Q. How long did it take to make the first impression on [50] your right ear?      A. How long?

Q. Yes.      A. Approximately how long?

Q. Yes.

A. Well, as long as I would take to tell you. I put my head on a pillow, and he had a mixing bowl, and he mixed something, and he put something in my ear, and fooled around, and then I felt some pouring in, and then he let it harden, just like as if you were getting a mud pack on your face, like the barber gives you, and then he took it out and he set it there. Well, in my opinion, that would take about 10 to 12 minutes.

Q. Yes. Then it was immediately after he took the first impression that he made the second impression—

A. Yes.

Q. —was it not?      A. Yes.

(Testimony of Frederick Hartley)

Q. Now, did you do anything in the store after the impression was made, after the two impressions were made?      A. Did I do anything in the store?

Q. Yes.

A. Walked out, and stopped at the desk where we had the check made out.

Q. Did you make any other purchases? [51]

A. No, sir, the store was closing.

Q. How long did you stay at the check desk?

A. About—on the way out, it was on the way out, and just talked to the man and asked—we forgot—we didn't have our check book, and the bank had a name similar to another bank, and I wasn't sure what name it was, and we looked it up in the book, if it was the right name, and it was, and we made it out—my wife made it out.

Q. Who made out the check at the check desk?

A. My wife.

Q. Were you present?

A. Not when it was made out. Only when we went out, she said, "That is the check desk."

Q. You didn't stop there then, did you?

A. Oh, yes. I stopped to look in the book they had there, and I was interested. They had the names of banks all over the world, and in this country, and I looked in the book to see if the bank was listed in my home town back in Connecticut, and I looked through, and it was there.

Q. How long did you spend there?

A. Oh, about three or four minutes.

(Testimony of Frederick Hartley)

Q. And were the lights on—

A. Yes, the lights were on.

Q. —when you left?           A. Yes. [52]

Q. Do you know about what time you left?

A. About 9:00 o'clock.

Q. And you went out from there up to the parking lot?

A. To the parking lot, and got my car.

Q. Which parking lot were you parked in?

A. Well, on the side street. There is only one parking lot.

Q. In the Pico parking lot?

A. As you come out of the door, there is a bunch of steps, and you come down and there is the parking lot. That would be on the side street, you know, on right angles with Olympic.

Q. On the following day, on Sunday, you state that your wife put a bobbie pin in your ear?

A. I asked her to look in it, and she said, "There is something in there." So I said, "See if you can touch it." So she reached over and got a bobbie pin and took the back end and put it in, and it was just like touching this (indicating), you could hear it.

Q. What did you do, if anything, to try to get it out?

A. I was sticking my fingers in there, and trying to move it, and I felt it, and I would push a little, and I felt it down in here by pushing, you know. I said, "That will never come out."

Q. You say you could feel something down— [53]

A. Down in here (indicating).

(Testimony of Frederick Hartley)

Q. Underneath you ear? A. About there, yes.

Q. About two inches underneath? A. How?

Q. About two inches underneath your ear?

A. No. Two inches would be way down here (indicating).

Q. How far underneath your ear could you feel this sensation?

A. Well, that would be about five-eighths of an inch.

Q. Five-eighths of an inch under the lower tip of your ear?

A. No, from the ear canal, from the ear opening, you know, the opening in your ear, then five-eighths down, if I remember right, right where I got my finger.

Q. Now, Mr. Hartley, when you said that you felt this burning sensation when the plaster was being put into your ear—

A. I said a warm sensation. I felt it down here, yes.

Q. How far down in your ear did you feel that warm sensation?

A. Five-eighths of an inch.

Q. Five-eighths of an inch from the—

A. That's right.

Q. —outer ear opening? [54] A. Yes

Q. So that when you indicated in your testimony that you felt it down here— A. Yes.

Q. —it would not be that far down?

A. Well, naturally not, no, because that would be in my throat, but I felt it over here (indicating) and here. It felt like I was boxed in, you know.

(Testimony of Frederick Hartley)

Q. Now, Mr. Hartley, to go back to the question: When this material was being put into your ear, did you feel this sensation all over the side of your head?

A. No. I just felt a warm sensation farther than I did on this ear. I didn't feel any sensation on this ear. I just felt a little sensation when he put it in there.

Q. A sensation of warmth?

A. Yes. It felt all right. It didn't bother me.

Q. There wasn't any sensation of its being cold?

A. No, warm.

Q. And that was about five-eighths of an inch from the outer opening of the ear?

A. The outer opening, about five-eighths of an inch.

Q. Now, when your wife put the bobbie pin into your ear, how far did she put the bobbie pin into the ear?

A. She couldn't put it in because it was all blocked up there. [55]

Q. You mean that right out—

A. That's right.

Q. —at the opening of the ear?

A. Yes, as far as it shows on here.

Q. Well, that isn't answering my question, Mr. Hartley. I will go at it another way. You say you put your finger in your ear? A. Yes.

Q. And your statement is that you could touch the object in your ear? A. Yes, sir.

Q. How far did you put your finger in your ear to feel it? A. Three-sixteenths of an inch.

Q. Three-sixteenths of an inch?

A. You could feel it with your little finger.

(Testimony of Frederick Hartley)

Q. From the outer opening?

A. From where you can put it in, and there it stopped, you could feel it.

Q. Did you put your finger into your ear after your wife put the bobbie pin in, or before?

A. Before.

Q. And you could feel, when you put your finger into your ear about three-sixteenths of an inch you could feel a sensation in your ear? [56]

A. Yes, hard, and I could feel—I would push and I would feel right in here (indicating), like here, just like it was all in there, like that I could feel it.

Q. You could feel when you pushed on the substance or this object that was in your ear?

A. Yes, I could feel it down in here (indicating).

Q. You could put your other hand on the outside of your ear and feel it?

A. No. I could just feel it, and I felt a sensation, and, naturally, if I have something in my ear and I push it, and I feel it, I feel it inside. I don't know. I might feel it here, but I don't suppose it is down there, but only you know it is there. So I says, "There is something in my ear; he must have forgot to take it out." So I asked my wife to see what it was, and she says, "It is hard as a rock."

Q. Now, what, if anything, did you do to try to remove it?

A. I didn't remove it. I didn't have anything to remove it with.



(Testimony of Frederick Hartley)

Q. Did you make any effort to remove it?

A. Sure, with my finger tried to dislodge it, and shake my head and try to get it out. I didn't know what it was.

Q. That is all you did?           A. Yes. [57]

Q. Now, when you went to work on Sunday did any one else look at your ear?           A. Yes.

Q. Who looked at your ear?

A. Well, my employer looked at it, and he looked in it and just touched it, put a little metallic piece in there, and it was just like that (indicating), you could hear it like that.

Q. What sort of a metallic instrument did he use?

A. It wasn't an instrument. It was just a piece of rod, a small blunt piece of rod, because he couldn't get—just to see how hard it was.

Q. He could see this in your ear very readily?

A. Yes. He said I should go to a doctor.

Q. How deep did you have this sensation in your ear when he would tap it with this piece of rod?

A. How deep?

Q. Yes.

A. Well, like I said before, it was a funny feeling. It felt like it was formed there and it was boxed in, and it was there, and it seemed to be all over, you know, and I wanted to get it out. It felt like it had to come out.

Q. What efforts, if any, did you make at that time to take it out?           A. To take it out?

(Testimony of Frederick Hartley)

Q. Yes. [58]

A. Didn't make any efforts. They all told me, "You better leave that alone and go to a doctor, and let a doctor look at that."

Q. Did you make any other efforts to take it out?

A. No, just trying to get it out by moving my head and feeling it. Then they sent me to a doctor.

Q. When did you go to Dr. Ghrist's office?

A. Monday afternoon. That would be on the 15th, Monday afternoon.

Q. You worked that morning, Monday morning?

A. Yes, sir.

Q. And when you came from the hospital on Wednesday, you went to work, did you not?

A. No, sir.

Q. Where did you go when you left the hospital?

A. I stopped—on my way home I stopped at the factory and told them—they all came up to see me the night before, and they couldn't see me, and so when I got out of there, it was on my way home and I stopped in, and they told me to go home and go to bed.

Q. When did you return to work?

A. The next morning I went in. I didn't go at the regular time. I got up a little late, and, you know, they liked me to work and I didn't want to lose any time, you know, because I was well, you know, outside of that bum ear. That's [59] all.

(Testimony of Frederick Hartley)

Q. And when you returned to work, you worked, with the exception of the time you went to the doctor's office, continually?

A. No. I took time off, and one time I got dizzy and sick and I should have gone home about 10:00 o'clock and then I went home about 1:00.

Q. When was that?

A. That was the Thursday following that.

Q. That would be the following Thursday, a week?

A. That would be the same Thursday of the week of the operation.

Q. That would be the following day after you returned from the hospital?

A. No. Let's see. Wednesday, Thursday—no, that would be the week following, the Thursday a week from that. That would be the 15th—what day would Tuesday be, the operation, the 17th?

Q. Tuesday would be the 16th.

A. Tuesday would be the 16th, the operation?

Q. Yes.

A. The next day would be the 17th, when I got out.

Q. Yes.

A. And the next day would be the 18th. That would be the 25th. [60]

Q. It was about that time?

A. About Thursday, because I went home, I couldn't stand any more, and I finally went home, and then I went back the next noon-time to work.

(Testimony of Frederick Hartley)

Q. On Friday?

A. Yes, I went back. I never stay out of work.

Q. When was it that you had this breaking sensation in your ear?      A. What time, you say?

Q. When did this drainage start in your ear?

A. The draining—well, my ear was getting—started to get worse then, you know, and I kept rubbing it, and I figured it would get better eventually, but it didn't. It kept getting worse. So I thought I was getting more infection. I got sick to my stomach, and I went home, and my wife put me to bed, and then I got up. So that was on a Thursday, and I went to work. I didn't go Friday morning. I went in about 1:00 o'clock, or 2:00 o'clock, and went to work for a couple of hours, and then I came home, and didn't work Saturday and Sunday. Then I came home, and on Saturday I felt terrible. I really didn't feel good, and I went to bed that Saturday night, and then something busted, and a lot of yellow matter and blood started coming out, and then I felt good. [61]

Q. And it didn't pain you after that?

A. No; just left me, you know, that there was something there. Then it started getting better from then on.

The Court: I believe we will take our recess now, Mr. Wheeler.

Ladies and gentlemen, we will take a recess until 2:00 o'clock this afternoon. Remember the admonition and keep its terms inviolate during the recess.

(Whereupon, at 12:05 o'clock p. m. a recess was taken until 2:00 o'clock p. m.) [62]

Los Angeles, California, Wednesday, May 8, 1946.  
2:00 P. M.

The Court: All present. Proceed.

Mr. Moore: If your Honor please, I noticed that your Honor mentioned the Zenith Radio Corporation in connection with Sears, Roebuck this morning. If you will recall, at the pre-trial counsel for the plaintiff consented to a dismissal against all other defendants.

The Court: I remembered that. Still I wanted to interrogate the jury.

Mr. Moore: Yes, certainly. Now, subject to your Honor's approval, Mr. Wheeler and I have agreed to put Dr. Ghrist on. He has kindly consented to come in, and if that may be done out of order at this time?

Mr. Wheeler: Surely.

The Court: Certainly.

DR. ORRIE H. GHRIST,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination.

The Clerk: Will you please state your name?

The Witness: Dr. Orrie H. Ghrist, G-h-r-i-s-t.

By Mr. Moore:

Q. Dr. Ghrist, where do you reside?

A. Glendale. [63]

Q. What is your business or profession?

A. I am an eye, ear, nose and throat specialist.

Q. Are you an M. D.?           A. Yes.

Q. Are you practicing at the present time?

A. Yes.

(Testimony of Dr. Orrie H. Ghrist)

Q. How long have you practiced as an eye, ear, nose and throat specialist?      A. Over 20 years.

Q. Are you a graduate of any university?

A. Stanford University.

Q. And you received your doctor's degree there?

A. M. D. degree.

Q. Will you give us a little history of what your work has been since that time, since the time of your graduation?      A. You mean concerning—

Q. Concerning the practice of eye, ear, nose and throat.

A. The speciality of eye, ear, nose and throat?

Q. Yes. •

A. I specialized in Vienna, Austria. I every year have spent a certain number of weeks in postgraduate work. I have spent time in postgraduate work at Temple University. I am a diplomate of the Congress of Auro-Laryngologists, which is a certificate you receive that you have been recognized as a specialist in that field. [64]

Q. You mean in the eye, ear, nose and throat field?

A. Yes.

Q. How long have you been practicing at Glendale?

A. Over 20 years.

Q. Now, on or about the 15th day of October, 1945, did you have any occasion to examine Mr. Fred Hartley, who is in the court room?

A. On October 15, 1945, Mr. Fred Hartley, the gentleman sitting there, age 46, who said his address was 338 East Beverly Boulevard, Pico, came to me for an ear examination, and he stated that he had been having a mold made for his ear.

(Testimony of Dr. Orrie H. Ghrist)

Q. May I interrupt for a moment, and ask you, Doctor, what are you reading from?

A. I am reading from the transcript of the record dictated while he was in the office.

Q. That is a regular record of yours, kept in your office in your regular routine?

A. Kept up daily, as I see the patient.

Mr. Wheeler: May I ask one question, Doctor? Do you have any independent recollection of the examination or the material or the matter which you are reading?

The Witness: If you are not fussy about dates, I have a very definite recollection.

Mr. Wheeler: Surely. [65]

The Witness: —because I never saw a guy with plaster of Paris poured clear down to the eardrum before.

Q. By Mr. Moore: Using your record, Doctor, to refresh your recollection on the dates, and I understand otherwise you are able to tell us what, if anything, you did and what examination you made in connection with Mr. Hartley?

A. If you are not interested in exact dates, I can tell you all about it.

Q. Well, I am interested in the dates, but except for telling us the dates that he came there, will you tell us what, if any, examination you made?

A. The gentleman came into the office complaining that he had some place, I believe he said Sears and Roebuck, but I don't remember—some place, anyway, had tried to make a mold for a hearing aid for him, and he said he was in quite a bit of pain, and that there was



(Testimony of Dr. Orrie H. Ghrist)

still something in his ear, and he couldn't hear, that they could not get it all out. And I looked in his ear.

Q. Do you recall which ear, doctor?

A. Yes, I am quite sure it was the left ear, but I had better check on that to be sure. (Examining record.)

The left ear.

Q. All right.

A. And I looked in his ear and saw a white hard mass which filled the inner third of the ear canal. [66]

Q. Now, will you explain to the court and jury where this ear canal is located?

A. Yes. Right here (indicating).

Q. You are indicating by placing your finger directly in your ear?

A. Yes. It is the canal which leads into the ear, from the outside ear into the eardrum, and this mass was in the inner third of the ear canal.

Q. Did you give Mr. Hartley any treatment at that time? A. Yes, I tried to remove it.

Q. Will you please explain what you did in that regard?

A. I tried with all the instruments I had to remove it, but it was so painful that it was impossible. It was excruciating.

Q. How could you tell that, Doctor?

A. I say that not only from the actions of the patient, but from the knowledge of the fact that the inner third of the ear is exquisitely tender, and isn't able to stand any manipulation, and any time I got an instrument in between this white material, which I assumed to be plaster of Paris—it was a white material and looked like plaster of Paris—every time I got my instrument in there

(Testimony of Dr. Orrie H. Ghrist)

and made any pressure, he was in severe pain, and I made no headway. [67] I wasn't able to budge the object.

Q. You used the word "exquisitely." What do you mean, Doctor, when you are using it in that way?

A. Exquisitely painful, severely painful. It is a very delicate membrane, and any pressure on the eardrum, the farther you get anything into the ear, the more painful it becomes.

Q. Were you able to remove that substance?

A. Not on that day. I worked there from perhaps a half an hour to an hour, and I worked off and on during the afternoon.

Q. What seemed to be the difficulty to get it out?

A. It was molded into the ear canal, and I could not get a purchase on it.

Q. By that you mean you could not get a grasp on it?

A. I could not get a grasp on it.

Q. What was the consistency of the substance?

A. It was white and hard, the consistency of plaster of Paris.

Q. I believe you stated that you had not seen that sort of substance in that position before, in your recollection?

A. Fortunately, I have not.

Q. Now, did you give Mr. Hartley any other treatment on that first visit, other than attempting to remove this object? [68]

A. I believe I advised him to soak it with fluid to see if he could soak it up any during the night, and to come to the hospital the next day and I would give him an anesthetic and remove it under anesthesia.

Q. What fluid did you recommend?

(Testimony of Dr. Orrie H. Ghrist)

A. Well, I will have to look (examining record). I don't remember.

Q. Did you attempt to soak it up yourself?

A. We soaked it off and on all afternoon.

Q. What did you use?

A. We used water and potassium iodide.

Q. What hospital did you tell him to go to?

A. Physicians and Surgeons, 211 West Laurel Street, Glendale.

Q. Did you see Mr. Hartley following this first visit on October 15th, 1945?

A. I didn't see him following on that day. I kept him around the office, trying to get this thing out, much of the afternoon, and we sent him to the hospital the next morning, and that was on October 16th.

Q. Did you see him at the hospital?

A. At the hospital I saw him, and we took him up to surgery, and Dr. Elsie Arbuthnot gave him pentothal anesthesia intravenously, and I scratched away at this material until I could scratch it into about two pieces, and finally into three [69] pieces, and then removed these pieces a piece at a time.

Q. About how long did it take you, Doctor?

A. It took me about 45 minutes.

Q. In scratching at the material, did you come in contact otherwise with the membrane of the ear?

A. Well, I tried not to, but undoubtedly I did, because by force of circumstance, being molded to the canal, I would have to touch the canal to start my downward scraping.

(Testimony of Dr. Orrie H. Ghrist)

Q. Now, after you removed that, what did you observe in the lower one-third of the canal?

A. First, I observed that it was a mold of the eardrum, the material that I removed. It had laid next to the drum, and when I removed it I notice there was no hole in the eardrum. I notice that there was a severe amount of inflammation, and the membrane began to swell within a few minutes after the material was removed from the inner third of the ear canal.

Q. Where was this inflammation?

A. On the canal wall and in the eardrum.

Q. Did you give him any treatment at that time, that is, in the hospital, after the removal of the substance?

A. Other than to flush it out and use a disinfectant, I don't recall.

Q. Did you see him any further in the hospital?

A. I saw him again on October 17th, and my note says [70] he was to go home that day.

Q. I gather from that that you gave him no treatment on the 17th?

A. Other than to look at it, and it looked like there wasn't anything to do until the inflammation went down. The foreign body was removed.

Q. Did you see Mr. Hartley again?

A. On October 19th he came to my office stating that he still felt dizzy and sick, and we gave him at that time some sulfadiazene.

Q. Did you look at the ear at that time?

A. Yes.

Q. Do you recall what you saw?

A. It looked—the eardrum was quite red and swollen. The handle was quite red and swollen, the flaccid or upper

(Testimony of Dr. Orrie H. Ghrist)

portion of the eardrum was swollen and thickened, and the inner third of the canal was extremely swollen.

Q. You gave him no treatment at that time other than to prescribe the sulfadiazene?

A. I didn't see anything I thought was indicated except the sulfadiazene.

Q. Now, did you see him again, Doctor?

A. I saw him again October 22nd, at which time he was improved, and we discontinued the sulfadiazene.

Q. Other than that did you do anything at that time in [71] the way of treatment? A. No.

Q. Did you see Mr. Hartley again?

A. October 29th, November 2nd and November 9th.

Q. What, if anything, was done on any of those days in the way of treatment?

A. On November 2nd there was—the whole thing had subsided markedly and was about all gone, so at that time we did an audiograph on him to see how much he could hear, or how much he couldn't hear. And then on November 9th I have a note that he looked normal, and we discharged him.

Q. Now, at any time was there any infection in the ear?

A. Well, I would say it is like you get your thumb hit with a hammer, and it gets awfully inflamed, but is it infected? There may have been some infection, but that wasn't the big thing. It was the injury, the pressure of the foreign body that caused the trouble. In any of these things where the surface is broken, you may have a little infection, and there must have been a little infection because I would not have given him the sulfadiazene on October 19th had I thought that it was merely pressure.

(Testimony of Dr. Orrie H. Ghrist)

Q. You have it indicated?

A. I had the impression that day that he must have had some infection with this thing. [72]

Q. With his reddened inflamed condition, is that normally accompanied by pain? A. Severe.

Q. Would you say that it was proper to pour a substance of that type into the inner canal of the ear?

Mr. Wheeler: If your Honor please, I object to that question on the ground that without proper foundation it calls for a conclusion of the witness and the answer is purely speculative.

The Court: I don't know, but I think an aurist ought to be able to express an opinion on that.

Mr. Wheeler: Well, whether it was proper to pour into the ear—

The Court: If it is the adjective in describing it, the objection is well taken. But the subject-matter of the inquiry in so far as a specialist on the ear is concerned I think would be a proper interrogation. Probably you can reframe the question so as to eliminate the question of pouring. That has a connotation that may not be definite in the evidence.

Q. By Mr. Moore: Doctor, would the injection into the lower third of the canal of the ear of a plaster of Paris-like substance be likely to cause trouble in that section of the ear? A. Almost always. [73]

Mr. Moore: No further questions.

Cross-Examination.

By Mr. Wheeler:

Q. Doctor, when you began, or, when you first examined Mr. Hartley's ear on October 15th, you say



(Testimony of Dr. Orrie H. Ghrist)

that you found this obstruction or foreign body in the lower third?

A. If he is lying down, with his head down, it is the lower third. If he is up, it is the inner third.

Q. The inner third? A. Yes.

Mr. Wheeler: This diagram may, for illustrative purposes, be helpful. I don't know where to put it, your Honor.

The Court: Put it on that easel, and there is a pointer there somewhere, I believe. Can you see that, Doctor?

The Witness: Yes.

Mr. Wheeler: I was wondering if it might be more convenient for you, Doctor, to come down here, and you can probably explain this.

The Court: Yes. Just take the pointer and sit down in that chair there, and, Doctor, if you will raise your voice, please, so that the reporter can hear you.

Q. By Mr. Wheeler: Will you point out on this diagram where this foreign body was, Doctor?

A. The foreign body lay approximately from there [74] (indicating) into the eardrum, making a mold of the drum itself, and being in immediate molded contact with the entire inner one-third of the ear canal.

Q. Do you recall from your examination of Mr. Hartley's ear whether the position of the canal and the general characteristics of that diagram of the ear are similar to his?

A. Approximately. We all have variations. Some ear canals are relatively straight and some are rather crooked, but, as I recall, his wasn't so very crooked, because otherwise I would have had more difficulty in



(Testimony of Dr. Orrie H. Ghrist)

scratching away all of this plaster of Paris substance that I had to scratch through before I could finally scratch away pieces of it to break it away from the eardrum.

Q. What was the thickness of the body in the ear?

A. The foreign body?

Q. Yes.

A. Well, about that long (indicating), and the diameter of the canal. I would say one-third of an inch. I may be off a little one way or the other, but approximately a third of an inch.

The Court: What would be the length measurement, Doctor?

The Witness: About from here to here (indicating) is about one-third of an inch, which was the plaster of Paris mass. It was my impression that the canal probably would have been full, and whatever happened was they broke off the [75] outside part and left this mass in the inner third, which they could not naturally pull out with the other mass.

Q. By Mr. Wheeler: Doctor, upon what do you base that conclusion?

A. The surface looked broken, as I looked in there.

Q. The surface of—

A. Of the plaster of Paris.

Q. The outer surface of the plaster of Paris?

A. As I looked in there. We will say the plaster of Paris substance. I don't know what it was. As I looked at the surface—well, if you pour plaster of Paris in a dish, it has a smooth surface, but if you break it, it has a rough surface, and the surface which faced me,

(Testimony of Dr. Orrie H. Ghrist)

faced out that way, was roughened as though it had been broken off.

Q. That could have occurred by efforts being made to take that object out, could it not have been?

A. Well, my impression of that is that if you pour it clear full of the canal, you are never going to get it all out by pulling.

Q. But that could have been—

A. An effort to take it out?

Q. Yes.

A. I don't think any other ear doctor took a look at it before I did.

Q. Well, we are indulging in speculation now, Doctor, [76] and that is your conclusion that you drew?

A. Yes. Well, the only effort that it appeared to me that had been made to take it out had been when they pulled the original mass out. Maybe they frogged around in there. I don't know.

Q. What was the depth in the ear between the outer opening of the ear and the outer edge of this mass?

A. The ear canal is about that deep, a little over an inch. I wouldn't be specific on that. About that deep, and it was two-thirds of that distance from the outside of the ear in to about there.

Q. Would it be possible to reach your finger—

A. No.

Q. —into that substance? A. No.

Q. Was the substance readily observable without opening the ear?

A. Well, that I could hardly say, because we always look with head mirrors, and we never make any effort

(Testimony of Dr. Orrie H. Ghrist)

to take them over to the window and look in. I mean I have no idea. It should have been immediately after the thing occurred, although I don't know. It depends on who is looking and how much he knows about guiding light.

Q. Well, in other words, it was necessary—I mean, to observe this obstruction or this foreign body in the ear, [77] it was necessary to insert a light and look into the ear in that way?

A. I am not at all sure of that, because often we can see the whole eardrum in an ear and examine it without inserting any light.

Q. Well, do you recall as to this particular ear—

A. I don't remember.

Q. —as to whether you could see it without?

A. I don't remember.

Q. Without using a light?

A. I don't remember.

Q. Or whether it was possible to see it without opening up the ear with an instrument, or pushing the various parts of the ear to one side?

A. I would be of the opinion that had I taken the gentleman over to the window, and had I known enough about light to have gotten my head in the right position relative to the position of the window, that I could have seen the white mass.

Q. Well, but it would still be your opinion that you would have to get the light into the inner ear from a particular direction to be able to see it?

A. Well, let me explain it this way: Last week I went fishing and I could see the fish-hook that far down

(Testimony of Dr. Orrie H. Ghrist)

in the fish's throat, and my boy couldn't see it at all, because [78] I knew which way to hold the fish.

Q. That is true, Doctor. What I am asking you is whether by merely putting his head on the table without the use of light you could observe the structure, or, this foreign particle?

A. I am quite sure that I could have, but I don't think my sixteen-year-old boy could have.

Q. Or the average person?

A. I don't know about the average person.

Q. Now, do you have these particles or pieces, Doctor?

A. I don't know. As a rule, those pieces are picked up in the surgery and sent to the laboratory, to the pathologist, and they are under the care of the hospital. If they are there, they are under the pathologist's report, and would be in his care at the Physicians and Surgeons Hospital.

Q. Well, was any request made of you to produce those pieces? A. If so, I don't remember.

Q. In accordance with your practice, if such a request had been made, you would produce them?

A. If I had them.

Q. Or if the pathologist had them, I mean they would be available to you? A. He could produce them.

Q. Who is the pathologist? [79]

A. His name is Doctor—it is Dr. Kimball's laboratory, and there are three doctors there, and who was in charge at that time, I don't know. But I can make some very definite statements about it. It was approximately one-third of an inch long. It was a mold of the eardrum, so it had to be in contact with the eardrum, because I held it up and examined it carefully immediately

(Testimony of Dr. Orrie H. Ghrist)

thereafter, to try to notice if it had the contour of the eardrum on it, and it was a negative mold of the eardrum.

Q. You could observe the—

A. The impression of the handle, and the position of the drum, and the position of the soft part of the eardrum up here (indicating). By the way, that isn't a very good picture, that handle that shows along the eardrum. I don't know where you got that one.

Q. Then you stated that you did make an examination immediately after?

A. Very definitely, because I wanted to know. It is the common procedure in these thing to put cotton down on the top of the eardrum for the inner half of the canal, and then pour in the plaster of Paris, and I wanted to know if the plaster of Paris had mashed down some cotton on to the eardrum, or whether or not there had been no cotton put in, and the plaster of Paris was exactly against the eardrum, and that is what made it so difficult for me to dig it out. When you [80] are digging a mass that hard, and you are against a membrane as delicate as the eardrum, and you have, of necessity, to use instruments which are sharp or chisel-shaped, you are very anxious as to whether you are on that eardrum or not.

Q. Certainly.

A. That is why I was so positive as to its examination on removal.

Q. And you made an examination of the eardrum after the removal of the foreign body?

A. Yes.

Q. What was its condition?

A. It was intact, but red and inflamed.

(Testimony of Dr. Orrie H. Ghrist)

Q. Was there any other damage, or was there any damage other than inflammation?

A. Well, apparently I had the feeling within a few days that there was a little infection which had accompanied this thing. If you take any foreign body and hold it against a membrane a length of time there is generally a little infection, but the infection wasn't an important problem in the first day or two.

Q. Doctor, coming back to this question, with the exception of possible infection or inflammation, was there any damage to the eardrum?

A. No. You have made the exception of the inflammation?

Q. Yes, that is correct. [81]

A. That is right. It was inflamed and it was irritated, and it was all those things, but it was not torn.

Q. Now, you made a subsequent examination of the eardrum, did you not? A. Yes.

Q. And I think you made an audiogram on November 2nd?

A. I believe that is the date as stated a while ago (examining record). 11-2-45.

Q. You made an examination of the eardrum at that time? A. Yes.

Q. And what was its condition?

A. It was practically healed.

Q. When you say "healed," Doctor, what do you mean?

A. Practically all the redness was gone, and it was practically back to the state which I assumed it was in before he had this experience.

(Testimony of Dr. Orrie H. Ghrist)

Q. Yes. There wasn't any tearing or any—

A. At no time did I see any tearing.

Q. —that had to heal, in that sense of the word?

A. No.

Q. On November 9th, when he was discharged, there was a complete absence of inflammation or infection?

A. Yes.

Q. Doctor, did you make any examination of Mr. Hartley's right ear? [82]

A. I have no note of it here except the audiogram.

Q. At the time of the making of the audiogram?

A. Yes.

Q. What does that show?

A. I have no notes of an examination of his right ear, except the audiogram report.

Q. Now, what does the audiogram report of examination show with reference to the two ears?

A. Well, just what do you want me to say? I mean—

Q. I don't know what it shows, Doctor. I can't tell you what to say because I don't know what the answer is.

A. Well, it showed here that he had a fairly good nerve on either side from the—Perhaps I had better draw it if you really want to know—

Q. That would be fine.

A. —because it is not as simple as just talking. Would you want me to lay this over—

The Court: Yes, put it over on the other side.

The Witness: And is there some chalk?

The Court: There ought to be some there.

Mr. Moore: May I have that copy, and maybe I can see one, and you can see the copy.



(Testimony of Dr. Orrie H. Ghrist)

The Witness: Have the jury a copy of the audiogram?

The Court: Never mind about the jury, Doctor. You just answer counsel's question and we will take care of the jury. [83]

The Witness: Well, in audiograms, like with a piano, we try to measure the tone vibrations that the patient can hear. This (drawing) is 128 vibrations, 256 vibrations, 512, 1,024, 2,048, 4,096, and 8,192. In other words, most of the hearing is down in this scale right through here (indicating), and in the audiogram it showed that the ears are approximately the same in his audiogram reading, and I will give the left ear here. At 512 vibrations the nerve of hearing—not the hearing, the nerve of hearing, and that does not mean what he hears—was normal. At 1,024 vibrations the nerve of hearing was normal. At 2,048 the nerve of hearing was down only about 5 degrees, just within the realm of normal.

The Court: Now, what are those side figures, Doctor?

The Witness: Those are losses in terms of decibels, and, relatively, the lower down you go the poorer the hearing, and if you stay up by this normal line, the zero line, the hearing is supposed to be normal. So with the nerve of hearing. His nerve of hearing was excellent in his range of hearing, and that is his left ear, and it dropped off to 40 per cent, which is not an abnormal drop for a man of his age, a little more than normal, it dropped off out in that manner (indicating). But his curve of what he actually heard was something like this (indicating), which was rather poor, and that is probably why the gentleman was wearing a [84] hearing aid. He had a pretty good hearing nerve. And the other ear is

(Testimony of Dr. Orrie H. Ghrist)

approximately the same curve. The man had a pretty good hearing nerve through the conversal area, but drops off on the top C of piano, and isn't much good. But his curve of hearing was quite poor, so he was probably wearing a hearing aid in order to build up this noise to where he could conduct it into the nerve of hearing. This was on November 2nd.

Q. By Mr. Wheeler: And the diagram for the right ear would be approximately the same?

A. Approximately the same. It is a little better than the left.

Q. Now, from your examination, Doctor, did you make any diagnosis of the cause of deafness?

A. No, I didn't make any effort to, but it was my impression—I mean, I didn't run him through any farther than that, but it was my impression it was a catarrhal deafness, or what we call a conduction deafness, which means the air—

Q. We can just leave that off there.

A. I will just show you how it worked (referring to diagram). The nerve of his hearing from there in, in the nervous portion, was apparently all right, but he had what we call a conduction deafness. The sound is not conducted properly from this point into the inner ear. [85]

Q. And that was the same condition that was present in his right ear?

A. In the other ear, yes.

Q. Are there any common causes of that condition?

A. We can say they are all catarrhal. A lot of them are catarrhal. It is catarrhal, or it is something that keeps these bones from properly transmitting a sound. The reason we know conduction deafness is that because

(Testimony of Dr. Orrie H. Ghrist)

the sound is not conducted from here to here (indicating), but the patient, were it conducted, could hear it.

Q. Excuse me, Doctor, but what do you mean by catarrhal deafness?

A. The older doctors always used to have the feeling that the patient had catarrh, and a snotty nose, and they blew it up and it kept or caused this Eustachian tube to be inflamed, and that caused a little pressure up here and it did not open up properly, and these bones could not function properly.

Q. I see. Upon examination of his left ear you found that the cone of light was present?

A. I don't remember that. I have no note as to the cone of light. When fellows can't hear any better than that, they don't generally have a very good cone of light.

Q. When Mr. Hartley first came in to see you, Doctor, he had a conversation with you, did he? [86]

A. Well, if so, I don't remember it.

Q. You don't remember the conversation?

A. In my office the nurse says, "Here is a guy with something in his ear."

Q. That was as you recall it?

A. That was as I recall it. He did say this: He told me—I remember this much of a conversation, that he told me he had gone some place to have a hearing aid made, and somebody had decided to make a mold and had poured some plaster of Paris in his ear, and he thought the guy poured too much of it in, or something to that effect. And when I looked in there, I concurred.

Q. Referring to your notes again, Doctor, it was on October 19th that Mr. Hartley came to you complaining that he felt dizzy?

A. I have October 15th.

(Testimony of Dr. Orrie H. Ghrist)

Q. That is originally, but I am beyond that. After the time of the operation, if you advert to your notes as to October 19th, was it on that date that Mr. Hartley came to you and said that he felt dizzy and sick?

A. Yes.

Q. And it was at that time that you prescribed—

A. Put him on some sulfa.

Q. —the sulfa. It was on October 22nd that an examination of the ear disclosed that the condition was so [87] improved that you discontinued the sulfa?

A. Well, I didn't say "so improved" in my notes. I said the condition was improved, and I thought it was all right to discontinue the sulfa.

Q. Yes. In other words, the disinfection, or, I mean the infection—

A. Sometimes sulfa clears up an infection rather rapidly, within 24 hours.

Q. And that was the appearance of the infection on October 22nd?

A. Well, it looked like the infection—everything was subsiding, so I discontinued the sulfa.

Q. Yes. Doctor, did Mr. Hartley ever call to your attention any sensation that he had on the left forehead, the left side of his forehead, or above his ear?

A. If so, I don't remember.

Q. Would there be any relation, in your experience, between the condition which you have treated and a sense of discomfort, such as a fly walking on your hair—I mean that sensation?

A. Oh, I think there could be, because often I have been called out in the middle of the night to open an eardrum because the doctor thought there was an abscess

(Testimony of Dr. Orrie H. Ghrist)

there, and I found the eardrum perfectly normal, and it was an abscessed tooth down in the lower jaw. We have referred pains and [88] sensations from inflammations.

Mr. Wheeler: I think that is all, Doctor.

Mr. Moore: Your Honor, may I ask one or two further questions, please?

The Court: Yes.

#### Redirect Examination.

By Mr. Moore:

Q. Doctor, you said you examined the end of this piece of material nearest to the drum to ascertain if there was any cotton there. Did you find any?

A. No.

Q. Did you find any on the drum when you looked at it?

A. No.

Q. Now, do you recall in the last week or ten days a telephone call from me in which I asked you regarding the foreign substance taken from the ear?

A. Yes. You asked me if it was some foreign substance, and I said I thought it was plaster of Paris, and if there was such a substance, it was still in existence, it would be in the laboratory at the Physicians and Surgeons Hospital.

Mr. Moore: Your Honor please, there was one question regarding the bill which I did not ask the doctor on direct.

The Court: Yes.

Mr. Moore: I would ask the privilege at this time to ask that one question. [89]

(Testimony of Dr. Orrie H. Ghrist)

Mr. Wheeler: If it is a question as to the reasonableness—

Mr. Moore: Not the reasonableness, but just the amount of the bill.

Mr. Wheeler: Oh, surely.

Q. By Mr. Moore: Doctor, will you look at your record and see what was your bill to Mr. Hartley?

A. My charge on October 15th was \$40.00, and there is a charge of \$5.00 for an audiogram on November 2, 1945.

Q. Have those charges been paid?           A. Yes.

Mr. Moore: Nothing further.

Recross-Examination.

By Mr. Wheeler:

Q. Does your record indicate, Doctor, by whom they were paid?

A. No. They were paid on January 22, 1946.

Mr. Wheeler: Thank you.

Mr. Moore: No further questions.

The Court: That is all, Doctor.

Mr. Moore: May the Doctor be excused?

The Court: You may be excused, Doctor.

Mr. Moore: I believe Mr. Hartley was under cross examination.

The Court: Yes. [90]



## FREDERICK HARTLEY,

the plaintiff herein, having been previously sworn, resumed the stand and testified further as follows:

## Cross-Examination (Continued).

By Mr. Wheeler:

Q. Mr. Hartley, you are using this Zenith instrument that you purchased on that night at the present time, are you not?      A. Now.

Q. You recall that your deposition was taken at my office about a week ago, and that I asked you the questions with reference to what the doctor had done to your ear on October 15th?

The Court: Mr. Hartley, please answer so that the reporter can get it. Speak up instead of nodding your head.

The Witness: Oh, yes. Yes.

Q. By Mr. Wheeler: At that time the recollection of the doctor's treatment didn't make you cry, did it?

A. When?

Q. In my office?

A. The recollection of the doctor's treatment?

Q. Well, I will put it this way, Mr. Hartley: You didn't cry in my office when I asked you about the treatment that Dr. Ghrist had given you or the efforts that he had made to remove the piece in your ear? [91]

A. No.

Q. Mr. Hartley, have you personally paid these bills, or have they been paid by some one for you?

Mr. Moore: If your Honor please, I object to that as incompetent, irrelevant and immaterial. If they had been paid by some one else, it is immaterial to this particular case.



(Testimony of Frederick Hartley)

The Court: Oh, I think not. The question is whether he has incurred the obligation to meet those items. If he has, then it is a subject-matter to be considered in this case. Overruled. Read the question, please.

(The question was read.)

The Witness: I personally paid for them and was reimbursed partially by an insurance company that I have an insurance policy with that pays \$25.00 for removing any foreign substance from the ear. And as Dr. Ghrist stated his bill was \$45.00, so I paid \$20.00, and gave him an insurance check for \$25.00. I waited until I got the insurance check for \$25.00 before paying the \$45.00.

Q. By Mr. Wheeler: With reference to the other bills did you pay those personally?

A. I paid them. They wouldn't let me in the hospital unless I paid them, and I paid them cash right on going in the hospital, and I got a receipt for them.

Q. Have you been reimbursed for any of them? [92]

A. I got reimbursed for a part of the hospital, up to I think it is \$6.00 a day, and then the insurance company pays \$7.00—I mean, the insurance company pays \$6.00, and my bill was \$7.00, and my bill come to around \$24.00 that I had paid, and the insurance company gave me a check for \$23.00 in reimbursing me.

Q. So that of the hospital bills you personally paid \$1.00?

A. I paid the difference between \$25.00 and \$45.00, which the insurance paid. The insurance company had paid \$25.00 for removing any foreign substance, and they would not pay any more, so Dr. Ghrist's bill was \$45.00, and so I had to pay the other \$20.00. I wrote out a check

(Testimony of Frederick Hartley)

and sent him the check from the insurance company for \$25.00. So that made a total of \$20.00, and \$1.00 more I had to pay the hospital, which was \$21.00.

Q. I am sorry, I don't understand you with reference to the doctor bill.

A. You asked me—

Q. Or, with reference to the hospital bill. You paid how much for the hospital?

A. Well, I went to the hospital that day and I had to pay \$20.00 or \$22.00. I don't just remember. It was either \$20.00 or \$22.00. Then when I was leaving the hospital I had something like \$2.04 or \$2.34. I had the check, or I have [93] the stub there. And then I gave all these to my insurance company, and they sent me a check for the amount, minus \$1.00. They only pay \$6.00 for the hospital a day, and I was in one day, and my hospital bill was \$7.00. So they added on to the bill which made the \$24.00, and so I just paid the extra dollar.

Q. Let me see. I don't want to spend too much time on this, but the record, I think, shows that you paid \$24.60 to the hospital.

A. That's right.

Q. Now, then, you were reimbursed \$23.60?

A. Something like that, yes; around \$23.00.

Q. So that you personally paid \$1.00 on the hospital bill?

A. Yes.

Q. And you personally paid \$20.00 on Dr. Ghrist's bill?

A. Correct.

Q. Now, with reference to the anesthetist, the person who gave you the anesthetic, the \$15.00, or, no, the \$20.00 charge for the anesthesia,—were you reimbursed for that?

(Testimony of Frederick Hartley)

A. Yes. I waited until I got the check from the insurance company and then sent the doctor that.

Q. Now, were you reimbursed for the \$2.00 that you spent for medicine? A. No. [94]

Q. So that of the total medical expense that you paid out, you paid \$2.00 for medicine, \$1.00 to the hospital, and \$20.00 to Dr. Ghrist?

A. That's right, yes, sir.

Mr. Wheeler: That's all. I have no further questions.

Mr. Moore: No further questions, your Honor.

The Court: That doesn't figure out just right, according to my mathematics. I am not swearing to it. But the anesthesia was a separate item here,—

Mr. Moore: That is correct.

The Court: —the \$20.00, and the doctor's bill was \$45.00 in addition to the anesthetist's charge of \$20.00. How much did the insurance company pay on account of the doctor's services?

The Witness: It was like this: As I got the bills, I turned them over to the insurance company, and it happened they just gave me the money,—they didn't pay the \$20.00 for the anesthesia until about a month or two months later, and I kept getting a bill from the anesthetist, and finally a check came from the insurance company, and then I mailed it to the doctor.

The Court: Then you were reimbursed for the anesthesia?

The Witness: Yes, sir.

Mr. Wheeler: No further questions.

The Court: Nothing further. [95]

Mr. Moore: Mrs Hartley.

## MRS. MARIE HARTLEY,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

## Direct Examination.

The Clerk: State your name, please.

The Witness: Marie Hartley.

By Mr. Moore:

Q. Mrs. Hartley, you are the wife of Frederick Hartley, the plaintiff in this case?

A. What was that?

Q. You are the wife of Frederick Hartley, the plaintiff in this case? A. That's right.

Q. Now, were you with him on the evening of October 13, 1945, when you went to Sears, Roebuck?

A. Yes, I was.

Q. Were you with him during the entire time that he was there?

A. Well, no, not all the time.

Q. Will you tell us what you did while you were with him on that date?

A. Well, we went in there with the intention of getting batteries, and, of course, he wound up by buying the earphones, and then, to make the story short, he went in to get the [96] impressions made for his ears, and he asked me to make the check out. Well, all the time he was having that done, I was in at the desk having—getting this check. Then when I came back, they were all made, and everything.

Q. In other words, you were not present when the impressions were made? A. Yes, that's right.

(Testimony of Mrs. Marie Hartley)

Q. Did you see the molds after you went back—

A. No, I didn't.

Q. —to where your husband was?

A. No, I didn't.

Q. About what time was it that you left the store, if you recall?

A. It was around 9:00, something like that.

Q. Did you stop at all on the way out?

A. No. Well, yes, we stopped—pardon me. We stopped at the desk, and we were interested in this big book they had there about different banks, you know, and everything, and we wanted to look up our state bank in the state I come from, and we spent about, you might say, about five minutes there.

Q. Before you left—

A. Or a few minutes.

Q. —the store, did your husband have any conversation with you regarding the making of the molds? [97]

A. No. Wait a minute. No, he didn't say anything. He didn't say anything. I didn't see no molds, or anything.

Q. Well, did you have any conversation with him at all before you left the store, after you left the place where the molds were made?

A. After we left the store?

Q. Before you left the store.                      A. No.

Q. Where did you go from the store?

A. We went to the show.

Q. To a movie?                      A. Yes.

(Testimony of Mrs. Marie Hartley)

Q. Was anything said to you by your husband at the show regarding his hearing?

A. Yes. He was uncomfortable, he says, that it felt like there was water running in his ear—that there was water in his ear, it just felt that way, and he kept rubbing that one side of his head.

Q. Which side was that?

A. The left side.

Q. Now, that was on Saturday night, was it?

A. Yes.

Q. On the next day, Sunday, October 14, 1945, did you have occasion to discuss with your husband this same ear?           A. That is the next day? [98]

Q. Yes.

A. Well, Sunday morning he woke up and he said to me, he said, "I want you to look in my ear." He says, "I feel there is something in it."

Q. Did you look in his ear?

A. And I looked in it, and I had to have a light to see it. You know, I had to turn my light on it, and there I saw this object.

Q. What light did you turn on?

A. My overhead, the ceiling light, and I saw this white substance in there. Well, I didn't know what it was, so I took out a bobbie pin, and took the round edge of the bobbie pin and just tapped it.

Q. Did you attempt to remove it?

A. No, I didn't.

Q. Did you know whether your husband attempted to remove it or not?

A. No. All I know is that he kept pushing his finger in his ear, that's all.



(Testimony of Mrs. Marie Hartley)

Q. Now, did he say anything further to you regarding his ear thereafter?

A. Well, I told him that he really ought to go to a doctor.

Q. Did he go to a doctor?

A. Well, that day, because there was no doctors—we [99] didn't know of any, you know, being Sunday, so we let it go until the next day. So Monday he went to see Dr. Ghrist.

Q. Did you go with him?

A. No, I didn't.

Q. What happened after that with respect to his ear, if anything?

A. Well, then the following day he came home—Monday he came home and said that he had to go to the hospital in the morning for an operation. Well, he got ready and went off the next day, and then I didn't see him until Wednesday, Wednesday afternoon, late afternoon.

Q. Did he ever complain to you about his ear after that time?

A. Yes, he did. It bothered him, and I know when he came home that night from the hospital, I had to put a pad on the pillow because his ear was draining, you see.

Q. That was the night he came home from the hospital?

A. Yes.

Q. Which was Wednesday?

A. Yes, that was the day he came home from the hospital. He went right to bed, and his ear drained, because the following morning I noticed it was a good thing I did that, because it was all serum and blood all over the pillow.



(Testimony of Mrs. Marie Hartley)

Q. Did his ear drain at any time after that time, to your knowledge? [100]

A. Well, it drained, yes. It drained right along, you know. Not too much; on and off, and then—well, then he had like the doctor says, he had the infection, and I know when he went to see the doctor, the doctor said he had that infection. It bothered him, and his head ached severely while it was draining and, you know, his head commenced to ache and that was when, oh, I don't know, he was just miserable, and he kept taking aspirins. And I just told him, I said, "Don't take too many aspirins." I know he complained a lot about the headaches.

Q. Did you notice or do you notice any difference in his hearing now than you did before this incident took place?

Mr. Wheeler: If your Honor please, I submit that is calling for a conclusion of the witness. There hasn't been any foundation laid and there aren't any objective standards by which that can be determined.

The Court: I suppose all that a lay person would say would be what he or she observed.

Mr. Moore: That is what I have in mind, your Honor.

The Court: If you will put the question in that form, she can answer. Otherwise it would call for perhaps some scientific knowledge.

Q. By Mr. Moore: Mrs. Hartley, have you observed any difference in the hearing of your husband since the incident, as contrasted with before the incident? [101]

A. Well, yes, I noticed a big difference there.

(Testimony of Mrs. Marie Hartley)

Q. Will you explain what it is that you have noticed?

A. Well, I noticed that before he used to be able to take his earphones off and I could talk to him and make him hear me.

Q. From what distance away?

A. Well, in fact, I could even be in the other room—in a small house in the other room, and I could say—I could turn and I could call him, and he would answer me. But I noticed that later, after the accident, I would be in the same room and I knew he didn't have his earphones on, and I would call him and he wouldn't even respond, so I would have to get up even closer to make him hear me. And I said, "Freddie, I think," I says, "I think there is something wrong. You are really getting much more hard of hearing."

Mr. Moore: That is all.

Cross-Examination.

By Mr. Wheeler:

Q. Do you know how long you were at the check desk, Mrs. Hartley?

A. Well, I was there practically—well, you might say fully 20 minutes. I didn't only stand at the check desk there, but there was some other counters right there, and while I was waiting my turn to get to the desk, I was looking at a few little things right near the desk. [102]

Q. Between the time—

A. Well, about 20 minutes.

Q. Between the time you left Mr. Hartley and returned?

A. Yes. There was a little—now, wait a minute. I will tell you. We spent a little time talking about the set,

(Testimony of Mrs. Marie Hartley)

I know that, when Mr. Owen was trying to sell him the set. We spent a little time there, and then it might have been close to 8:30 or something like that, or it wasn't quite that, and I went over while I was getting that done—I went over and was getting the check at the desk, and I spent a little time talking to the man at the desk, too, so by the time I got through it was, well, about ten minutes of nine, something like that.

Q. Did you look at the clock at that time?

A. Yes, I did. I remember distinctly I looked at the clock. I didn't look at the clock, because I had my own watch then.

Q. You looked at your watch at ten minutes of nine?

A. Yes.

Q. And that was the time you returned?

A. I returned. Then we returned back to the desk. We got everything done, everything was O. K'ed, and we hurried, and we went back to the desk again.

Q. So you looked at your watch, and it was ten minutes to nine? [103]

A. Where are we? Pardon me.

Q. When you returned to your husband, where he was having,—or where he had had these ear molds made—

A. Yes.

Q. And when you returned, the impressions that were made of his ears had been completed?

A. Yes, everything was completed. I didn't see any of it. He was ready to leave, you see, and I gave Mr. Owen the check.

(Testimony of Mrs. Marie Hartley)

Q. And after you gave him the check you turned and left?

A. We went over towards the desk. We had to pass the desk, and we just thought we would stop, and we spent a few minutes there.

Mr. Wheeler: I have no further questions.

Mr. Moore: No further questions.

The Court: That is all.

The Witness: All right. Thank you.

The Court: I think we will take our recess now, ladies and gentlemen, for a few minutes. Remember the admonition.

(A short recess was taken.)

The Court: All present. Proceed.

Mr. Moore: Mr. Frank Owen, please. [104]

FRANK OWEN,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Frank Owen.

Direct Examination.

By Mr. Moore:

Q. Mr. Owen, where do you reside?

A. 422 North Garfield Avenue, Monterey Park.

Q. What is your business or profession?

A. Accountant, formerly.

(Testimony of Frank Owen)

Q. What is it at the present time?

A. Retired at the present time.

Q. Were you employed in the month of October, 1945?

A. Yes.

Q. Where were you employed?

A. Sears, Roebuck & Co.

Q. What was your position with them at that time?

A. Well, I was so-called manager of the hearing aid department.

Q. How long had you held that position with them?

A. About a year at that time.

Q. Will you tell us, briefly, your duties in connection with that position?

A. Well, first, I was selling hearing aids and then [105] selling accessories, and the taking of the ear molds to complete the job.

Q. This taking of the ear molds, what was that?

A. Well, that was securing an impression of an individual's ears so as to send it to the laboratory so that they may complete an earpiece, that they may make an earpiece for the hearing aid.

Q. Were you doing that during the month of October, 1945?

A. Yes, sir.

Q. For how long a period prior to that time had you been making impressions for ear molds?

A. One year.

Q. Did you have any training or instruction in that regard—

A. Yes.

Q. —prior to commencing that work?

A. Yes.

(Testimony of Frank Owen)

Q. From whom?

A. First, from Mr. McKenna, the supervisor of the hearing aid department of all stores.

Q. You mean all Sears, Roebuck stores?

A. All Sears, Roebuck stores. And Mr. McKenna directed me to the laboratory where the earpieces and ear molds are made, both, for instructions by them. [106]

Q. Where was that?

A. 727 West Seventh Street.

Q. Is that the Clark Laboratory?

A. The Clark Laboratory.

Q. How much training or instructions did you get?

A. There was a sample made, and it didn't take too much time. I spent a little time with Mr. Goodrich of the Clark Laboratories ?

Q. Did you receive any written instructions from them?

A. I think that I received the written instructions, that we had them in the store at that time, and I read them over.

Q. And your Mr. McKenna, did he give you any written instructions?

A. No written instructions, except that he handed this to me and told me to read it.

Q. That is the instructions from the Clark Laboratories?

A. Yes.

Q. Do you remember what instructions you received with respect to making of the ear molds?

A. Well, as I said, it is a very simple matter, and there isn't very much to it. Of course, I can tell you, if you wish the description.

(Testimony of Frank Owen)

Q. Yes, I would like to know.

A. In the first place, you see that the outer layer of [107] the ear is covered with an oil.

Q. What kind of an oil?

A. We used a baby oil; any kind of an oil to prevent the plaster from sticking. Then you proceeded to see that there is a piece of cotton inserted in the ear to prevent the plaster from going into the ear.

Q. Going into what portion of the ear?

A. The inner ear.

Q. Is that the same as the ear canal?

A. Well, the ear canal leads to the inner ear, yes.

Q. Were you instructed, were you told the reason why that cotton was placed there?

A. Well, it is obvious. I don't think any one would need to be told why it was placed there, but in Mr. Goodrich's laboratory the gentleman there placed it there, and I read that it should be placed there. Naturally, we did it.

Q. But were you given the reason why it was placed there?

A. I don't know whether any one said, "This is to prevent the plaster from going into the inner ear." That wouldn't need to be stated. That was very obvious, as I stated before.

Q. Then what was done?

A. Then after building up a little plaster so that you might have a sort of a handle on it, you let it set until it [108] gets hard.



(Testimony of Frank Owen)

Q. Do I understand from your instructions that you prepared a plaster-like substance ahead of time before it was put in the ear?

A. Not very much ahead of time. It was prepared right then and put in.

Q. Then it is placed in the ear. And what is its consistency?

A. I would say a heavy cream, or something that will pour easily.

Q. Then what is done, under the general plan of making molds?

A. You take a spatula, or something of that character, and work that plaster down well into the auditory canal, so that when you remove it there will be no break-off.

Q. Do you work it down as far as the eardrum?

A. Oh, no.

Q. Then what is done?

A. Then you let it set.

Q. Does it harden?

A. Until it is hard enough to remove.

Q. Then how is it removed?

A. Well, just by manipulation with the hands, pushing the earpiece away—pushing the ear away from the ear mold, and pulling and pushing the flesh around the ear until it [109] easily comes out. There is not much to it.

Q. After the mold is removed, were you instructed anything further to do with the ear?

A. Yes, we cleaned—we see to it that there is no little surplus particles of plaster that may be around the ear. It may break off a little around the edge and drop on the ear. We see that is cleared away. Then we use the liquid to wash the ear, to wash any surplus away.

(Testimony of Frank Owen)

Q. Did you use any light of any sort in connection with the operation?

A. No, that isn't necessary.

Q. On October 13, 1945, did you have occasion to fit an ear mold for Mr. Hartley, the plaintiff in this case?

A. Yes.

Q. You did prepare molds, did you?

A. Yes.

Q. For which ear?                   A. For both ears.

Q. Do you know, of your own knowledge, whether the molds as so made were sent to a laboratory for preparation of an earpiece?                   A. Yes.

Q. I show you Defendant's Exhibit A, and ask you whether you recognize that.

A. No, I wouldn't recognize it. [110]

Q. Would you say with respect to Exhibit B whether you recognize Defendant's Exhibit B?

A. Well, what do you mean by "recognize?"

Q. Do you know what it is?

A. Oh, yes, I know this (indicating) is an ear mold and this is an earpiece.

Q. Do you know whether or not this is the one which was made by you for Mr. Hartley?

A. Well, of course, and if I knew that was Mr. Hartley's earpiece here—

Q. You are pointing to Exhibit A?

A. I am referring to Exhibit A. It is my belief that this ear mold, this Exhibit is not made—I mean to say, the Exhibit A I believe is not made from Exhibit B.

Q. All right. Now, how about Exhibit C?

A. Exhibit A, the earpiece, is made from Exhibit C.

(Testimony of Frank Owen)

Mr. Moore: Thank you. No further questions.

Mr. Wheeler: I have no questions.

The Court: That is all.

Mr. Moore: That, your Honor, is the plaintiff's case.

Mr. Wheeler: If your Honor please, at this time I would like to make a motion to dismiss on the ground that there is no showing of negligence on the part of the defendant, Sears, Roebuck & Co.

The Court: The matter is a question for the jury under [111] proper instructions. For those reasons the motion at this time will be denied, without prejudice. Proceed.

Mr. Wheeler: Mr. Owen, will you return to the stand, please?

FRANK OWEN,

called as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Wheeler:

Q. Prior to the time that you were employed by Sears, Roebuck & Co., by whom were you employed?

A. For 28 years with the Union Oil Company, until 1939.

Q. In Los Angeles? A. Yes.

Q. In what capacity were you employed?

A. As an accountant.

(Testimony of Frank Owen)

Q. What was the date of your employment by Sears, Roebuck & Co.?

A. About November, 1944.

Q. In what capacity were you employed at the time of your original employment?

A. With Sears, Roebuck?

Q. What were you to do?

A. To sell hearing aids, and accessories, and make ear molds. [112]

Q. What type of hearing aid were you to sell?

A. We sold both bone and air conduction instruments.

Q. What make of instruments?

A. They were made by Zenith Radio Corporation.

Q. Now, were you employed in November. When did you receive the instructions from the Clark Laboratories?

A. In the very first week, I think. Mr. McKenna gave me instructions immediately, and then he sent me to the Clark Laboratories.

Q. Now, Mr. McKenna's instructions occurred immediately after your employment?

A. Yes.

Q. Then you were instructed by the Clark Laboratories approximately during the first week of your employment?

A. Yes.

Q. Do you know how many ear molds you had made prior to the time that you made the ear molds for Mr. Hartley?

A. Oh, I must have made 150 or so.

Q. During this period of approximately 11 months?

A. Yes.

(Testimony of Frank Owen)

Q. Calling your attention to October 13, 1945, I will ask you if you met Mr. Hartley on that day?

A. Yes.

Q. Do you recall where you met him?

A. In the hearing aid department. [113]

Q. And that is located in what store?

A. Sears, Roebuck Ninth Street Store.

Q. Sometimes called the Olympic Boulevard Store?

A. The Olympic Boulevard Store, yes.

Q. Do you recall the time of the evening that you met him?

A. Well, it was—I don't know the time, no; not exactly. It was probably maybe about as has been stated, around about maybe 8:15, 8:00 o'clock.

Q. Do you recall that Mr. Hartley was accompanied by his wife?      A. Yes.

Q. Did you have any conversation with Mr. Hartley with reference to the purchase of an ear mold, or, rather, a hearing aid?

A. A hearing aid. Not particularly. Of course, we were selling aids, and if anyone was not getting along successfully with the hearing aid he had, if he had one, naturally we would suggest the testing of a Zenith.

Q. Do you recall what the occasion was that brought Mr. Hartley there? Did he say why he had come to the department?

A. I don't recall that he did.

Q. Do you recall any of the conversation that you had with him? [114]]

A. Well, specifically, no. But I always say to any one who probably is not getting along with their hearing aid, "Let's try the Zenith."

(Testimony of Frank Owen)

Q. He was wearing a hearing aid at the time, was he?

A. Yes, I believe he was at that time.

Q. Do you recall what type of hearing aid it was?

A. A bone conduction instrument.

Q. That is a different type than the so-called air conduction? A. Yes.

Q. What is the difference between bone conduction and air conduction?

A. Well, the bone conduction is like one I am now wearing. The vibrator touches the mastoid bone back of the ear. It may work on any portion of the head. That is bone conduction. Air conduction is one where the vibrator goes into the ear, and goes in with a fitting, a special fitting of some sort or other.

Q. Now, do you recall what you did in connection with Mr. Hartley's visit to the store on that evening?

A. Oh, yes. Mr. Hartley purchased the instrument, and, of course, if he is getting air conduction, why, the best thing he can do, a person getting an instrument, is to have the earpiece made.

Q. What is the purpose of the earpiece? [115]

A. It is to secure a better contact, and also to keep any extraneous noises from entering the ear through the ear canal.

Q. Referring now to the Zenith type of instrument, the Zenith instruments are equipped for either bone conduction or air condition with the ear piece?

A. That's right.

Q. Is there any standard equipment that comes with the Zenith set for air conduction?

A. Yes, there is. There is a set of tips and tubes, as we call them, plastic tubes of different sizes. There are

(Testimony of Frank Owen)

four, and four rubber tips of different sizes, so that the individual can fit his own ear, you see. Some of those, some combination of those four tubes and tips will fit most any one fairly well.

Q. When you refer to a tube, what is it, and what do you use it for?

A. Well, the plastic tube is a little tube with a shoulder on it that snaps on to the ear phone, and on top of the plastic tube is the rubber tip which is to be inserted in the ear for hearing.

Q. How large is this tube that fits on to the receiver part?

A. Oh, I should say three-sixteenths of an inch maybe, the heavy part of it, and it snaps on to the ear-phone. [116]

Q. How large in diameter is the circular end?

A. Well, it is just a little tube, a little smaller at one end than the other, with a shoulder so that when you put the rubber tip over the tube, it will stay on. There is a shoulder there to keep it from falling off.

Q. The tip then is inserted into the ear, is it?

A. That's right.

Q. Does the tube go into the ear as well?

A. Well, it goes in under the tip, yes. The tip is slipped over the plastic tube. The plastic tube is snapped on to the earphone, and that makes the temporary fitting. We call it temporary.

Q. You refer to it as a temporary fitting?

A. We call it temporary, yes, and we think the ear-piece is much better.



(Testimony of Frank Owen)

Q. Now, for the purpose of fitting a person, or fitting a person's hearing aid with an earpiece, what must you do?

A. For fitting, getting an earpiece, you mean?

Q. You make a mold?

A. The first thing to do is to secure the mold, of course, and the person is arranged in a position where you can make the mold, and then—

Mr. Wheeler: If your Honor please, may I ask will we adjourn at 4:00 o'clock or at 4:30? [117]

The Court: About 4:30, I think, or a little before 4:30.

Mr. Wheeler: The reason I ask that is because I was going to ask the witness, for illustrative purposes, to show just what is involved in this process of making a mold, and I just wanted to make certain that we had ample time.

Mr. McKenna, would you come forward, please.

(Mr. McKenna did as requested.)

Mr. Wheeler: If your Honor please, I was going to ask, for illustrative purposes, to have Mr. Owen demonstrate just what was involved in this process of making an ear mold, and relate it to the making of the mold or the two molds that he made for Mr. Hartley. He can show just what was done, and how he did it, and that was the purpose. It will take just about 10 minutes, I think.

The Court: ...And who is this gentlemen, Mr. McKenna?

(Testimony of Frank Owen)

Mr. Wheeler: Mr. McKenna is the supervisor of the hearing aid department for the Los Angeles district of Sears, Roebuck & Co.

Mr. Moore: Counsel, is he the Mr. McKenna that has been referred to in the previous testimony of Mr. Owen?

Mr. Wheeler: Yes, and he will be offered as a witness subsequent to Mr. Owen.

The Court: Is there any objection?

Mr. Moore: No objection.

The Court: Proceed. [118]

Mr. Wheeler: I think we can use this table.

The Court: But in doing so, use it so that every one can see it. I don't believe those jurors in the back row can see from there. You might have to elevate the table a little bit so that they can see.

Mr. Wheeler: We can push it back a little bit, probably.

Mr. Moore: As I understand it, this is an illustration of how molds are generally made, and it is not an attempt to say that this is the way exactly that it was done with Mr. Hartley?

Mr. Wheeler: That is correct. Then I will relate it, so that we understand what is involved, I will relate Mr. Owen's testimony to it.

The Court: Can you all see this, ladies and gentlemen? I think they can all see it all right.

Mr. McKenna: Now, do you want to get the water?

The Court: Do you want some water, a glass of water?

The Witness: A glass of water will be fine.

The Court: Will a glass of water be enough?

The Witness: Oh, yes.

(Testimony of Frank Owen)

Mr. Wheeler: Mr. Owen, if you will just tell now, as you make this ear mold, what you are doing and the instruments you use, how you seat the person who is going to have the mold made, and so forth.

Mr. Moore: May I ask counsel if Mr. McKenna is likely to [119] make any comments during the course of this?

Mr. Wheeler: None whatever. He is an innocent bystander.

The Court: Is it necessary that Mr. McKenna be here now? He obstructs the view of the jury somewhat.

Mr. McKenna: I will sit down here. I am going to sit down, Judge.

The Court: Now, describe what is being done.

The Witness: I am making an examination now to see if there are any hairs in the ear, which must be removed before you attempt to make an ear mold. Here are the tweezers.

Mr. Moore: I suggest, counsel, that we let the record show that Mr. McKenna has his head lying on the table, with his left ear on the towel, and with his right ear upwards.

The Court: And is sitting on a chair right beside the table.

The Witness: It is immaterial whether you put oil in the ear before you insert the cotton or not, but this cotton is to prevent any foreign substance from going into the ear.

Mr. Moore: And you are inserting that with the tweezers?

(Testimony of Frank Owen)

The Witness: With a little bent tweezers. Now, that is inserted, and we can proceed to clip any little hairs that may protrude, any heavy hairs, with a pair of scissors.

Now, the next thing to do after inserting the cotton and clipping the hairs is to moisten this with oil.

The Court: Moisten what with oil? [120]

The Witness: This Q-tip or common little household thing, with a little cotton on the end, on each end of it.

Mr. Wheeler: A cotton swab?

Mr. Moore: I think it has a trade name, "Q-tip." I know that with my children we use that.

The Witness: Now, we usually have some place where we can squeeze the excess oil off. I will do it on the towel.

Now, we proceed to see that all of the portion of the ear there is moistened with the oil or covered with the oil, so that you have a film, a thin film of oil all over the ear. Now, in order that there may be no excess oil, we just take the other end of the Q-tip and just rub out all of the oil that you can, and that leaves sufficient oil on, you see.

Mr. Wheeler: Can the members of the jury see the depth the cotton is from the outer surface?

The Witness: You can easily see the cotton here.

The Court: Can you get up and assume the same position later on?

Mr. Wheeler: He can't hear you without his hearing aid, your Honor.

The Witness: You can see the cotton right there.

The Court: You can see the cotton, but I want to know whether the jury can.

The Witness: Show them the cotton in your ear.

(Testimony of Frank Owen)

The Court: You can walk along there, hesitating a moment [121] so that each juror can see what the other jurors see. Now, tell him to walk back up here, so these gentlemen up here can also see it.

Mr. Wheeler: Will you show these other gentlemen?

(Mr. McKenna did as requested.)

Mr. Moore: Your Honor please, counsel has kindly consented in this particular type of demonstration that I might perhaps ask a question here and there rather than wait for cross-examination.

The Court: Very well.

Mr. Moore: If I may ask one question now: Is the cotton there down in what is known as the canal?

The Witness: The auditory canal.

Mr. Moore: The auditory canal.

The Witness: The auditory canal.

Mr. Moore: And this film of oil goes down to the cotton?

The Witness: It should, yes. If it should not exactly go down, you might have a little adherence of plaster at the point you touch.

Q. By Mr. Wheeler: Will you state for the record, Mr. Owen, how far in the canal that cotton appears to be?

A. As to distance I could not state, but I know there is sufficient cotton there to prevent any plaster going in the ear.

Q. No, but can you measure it? I mean, just take [122] something and—

A. Well, from the outer ear, from this piece of the ear right here, from that point on in, it is a distance of

(Testimony of Frank Owen)

half an inch; that is, the top of the cotton that you now saw.

Then after getting the ear parts oiled with oil, then you proceed to mix the plaster.

Mr. Moore: That is a rubber cup?

The Court: Here is a cuspidor, if that is what you are looking for.

The Witness: That is what I am looking for. There is a little excess; more than I need.

Q. By Mr. Wheeler: How much water approximately did you have in the cup?

A. Probably about as much water as plaster.

Q. Equal proportions?

A. Now, I should have a little spoon here, to dip that plaster out. It would make it more convenient. Perhaps I can guess at it this way. It is a little harder to do. That is what happens, you see, when I don't have the spoon, but I can probably guess.

The Court: I am sorry, but we don't have a spoon.

The Witness: That needs to be a little thicker.

Mr. Wheeler: Perhaps you could take the scissors here and use them as a spoon. [123]

The Witness: Maybe I could. I will see if I need that. I am sorry, that isn't quite thick enough yet.

The Court: What is that white powdery substance that you are putting in there?

The Witness: That is what we call ear mold plaster.

The Court: Do you know what its composition is?

The Witness: Probably plaster of Paris, mostly. I do not know what it is.

Now, after this is thoroughly mixed, then it is ready to insert it in the ear.

(Testimony of Frank Owen)

Q. By Mr. Wheeler: Can you take a minute and just show that to the jury?

A. I don't want to take too long. It is just a thick mass, like a heavy cream. I don't want to take too long, because it sets and should be in here.

Mr. Moore: May I ask if there is any reason why a rubber cup is used?

The Witness: No.

The Court: Let him put it into the ear, so that it will solidify.

The Witness: Now we begin to put this in.

The Court: The record shows that the witness is pouring the material into the ear.

The Witness: This operation here is to see to it that all of the plaster,—to see that there are no bubbles in the [124] neck of the earpiece, so that it won't break as you remove it. Now, all we have to do now is to build a little handle on it, as you might say, so that in removing it it will not be a difficult job and we can get it out without breaking.

The Court: The record shows, I think, and I can't see clearly from where the bench is, but isn't the orifice completely obscured by the material?

The Witness: Yes; yes. Now, that happened to be a little soft, and rolled down a little more than it should, but that is because perhaps we didn't have quite the right quantity in there. After you have used a spoon, you know just what the quantity is to put in, in the first place, but that doesn't make any difference. Now, we will let the plaster rest until it sets, and then proceed to remove it.



(Testimony of Frank Owen)

Q. By Mr. Wheeler: Have you had these plaster molds made of your ears? A. Yes.

Q. Is there any warmth generated in the hardening process?

A. There always is a warm feeling there, and sometimes people ask because it is getting a little warmer all the time. Naturally, in any oxidation or letting of plaster dry in an ear, naturally it creates heat.

Mr. Wheeler: What was the oil? You have already identified the oil that you have used? [125]

The Court: Is that what you call the baby oil, Mr. Owen?

The Witness: I don't know about this oil, but it is used. It isn't identified there, but I suppose that is the same as we have used in the store.

Q. By Mr. Wheeler: And the pink colored liquid is the cleansing?

A. Yes, that is the cleansing, the liquid we use after the earpiece is out.

The Court: Do you have any specific time that you permit it to solidify?

The Witness: About five minutes, but that depends a little on the humidity and the mix, the degree of moisture, the water you have in the mix. The thinner you have it, the longer it takes to dry.

Q. By Mr. Wheeler: This arrangement here of the small table is similar to that which you employed, is it, at Sears Roebuck & Company?

A. Yes, similar, only we had a pillow in addition to the towel. We have a towel and place it on the pillow.

Q. But the seating arrangement is similar?

A. Yes, similar, that's right.

(Testimony of Frank Owen)

Q. How do you tell when it is hard enough?

A. Well, a good way is just by striking it with the finger-nail. You can tell when it is beginning to harden, [126] and you can allow a little time when it is beginning to harden. If you should scratch it with your nail, it would be soft.

The Court: Is there any way of determining, Mr. Owen, whether the entire mass that you put into the ear solidifies simultaneously?

The Witness: Well, occasionally you break off an earpiece when you are removing it; if you attempt it too soon, it is likely to break, and then that means that it hasn't had time to harden, and you simply recover the balance of it with the pair of tweezers, this tweezers' kit here.

The Court: Considerable of the material is out in the world, out in the open air?

The Witness: Most of it, yes. The laboratory, of course, don't use much of the plaster. They only use the inside of it, as you have indicated.

The Court: And considerable of the material is on the inside of the ear, which has, in addition to the atmospheric conditions, the warmth of the body?

The Witness: That's right. You see, that was a little thinner than ordinarily, and that will take maybe a couple of minutes extra for drying.

Q. By Mr. Wheeler: You have no way of determining what proportion you used of the water and plaster for this particular mix?

A. Well, in practice, I have a spoon and I got about the [127] right amount, and it is very easy, and if I

(Testimony of Frank Owen)

need additional plaster it is very simple to take half a spoonful, or of water, and I can judge it better than where I have to dump it in with the container.

The Court: Mr. McKenna will be getting tired there.

Mr. Wheeler: He may fall asleep.

The Witness: Well, it isn't quite ready to remove yet. I think that has been there about five minutes now, hasn't it?

Mr. Moore: About six.

The Witness: About six minutes. It is just a little—not quite ready to remove. If that had been a thicker plaster, it would probably be ready to remove now.

Now, the only thing to do in removing the earpiece is to begin simply, as any one would, by pushing the flesh a little bit away on each side, pull your piece over like this gradually, and if you have a patient that is nervous, and all that, you take a little more time. But when one understands what is going on, they don't worry any. Now, we are not quite through yet. We have the ear-piece out, and the next thing is to examine the ear, and you may see those little white speckles. You see, there isn't much to do to remove that. In fact, it would not be necessary to do anything, but we always do this.

The Court: What are you doing now?

The Witness: Now, we have inserted this in a little [128] cleansing fluid that we put in there, and we just rub the ear out like this. This probably removes any oil that might be adhering around the face.

The Court: What is that cleansing fluid?

The Witness: I beg pardon?

The Court: What is the cleansing fluid?

(Testimony of Frank Owen)

The Witness: It is probably something like a mouth wash, something of that character. That's all, Mr. McKenna.

Q. By Mr. Wheeler: When you said you take this, you were referring to a Q-tip that you dipped into the cleansing fluid?

A. That's right, these little things here.

Mr. Moore: Did you remove the cotton from his ear?

The Witness: Did I? It wasn't necessary. Just as in all cases, there is the cotton on the earpiece. When you get the cotton out, then you are sure you have a job done. If you don't get the cotton, then you have something else to do. There is the cotton with the earpiece, just as nice an earpiece as you can have. That will cost you \$6.00, Mr. McKenna.

Mr. Wheeler: You might pass it along to the jury, so that they might examine it.

(The plaster mold was passed to the jury.)

Mr. Wheeler: Now, if you will resume the witness stand.

Q. By Mr. Wheeler: Referring now to October 13, 1945, and particularly your discussion with Mr. Hartley, what did [129] you do? Did you make an impression of Mr. Hartley's ear?

A. Yes. I first took an impression of Mr. Hartley's right ear. Then with that completed, I took an impression of the left ear.

Q. What did you do in making an impression of the right ear?

A. Well, I went through exactly the process I did with Mr. McKenna, and the same with the left ear.

(Testimony of Frank Owen)

Mr. Moore: That is objected to as a conclusion of the witness, and I ask that it be stricken.

The Court: Well, that would be true. He would have to relate specifically what he did.

Mr. Wheeler: Yes.

Q. By Mr. Wheeler: Will you relate just what you did? A. With Mr. Hartley's ear?

Q. Yes.

A. Well, first Mr. Hartley took the position as Mr. McKenna did, with the right ear up, the first one. I washed the ear with oil, then removed the excess as I did here. I inserted the cotton. Now, I may have inserted the cotton first, or afterwards. It would be immaterial, unless you were clipping hairs, in which case you should put the cotton in first.

Q. You don't recall now whether you put the cotton in first or the oil? [130]

A. I am not sure about that. If I clipped any hair I should have seen to it that the cotton was in first. Then after the cotton is inserted in the ear, you are ready to make the mix for the mold, prepare the mix, see that it is about the right consistency, then pour it in the ear. Then take the spatula and work it well down into the auditory canal, and a little bit into the cotton, so that when you take the mold out the cotton adheres to it, just as it did in Mr. McKenna's case. That was the making of the right ear mold. Then after it was dry I proceeded to extract it, as we did here.

Q. With reference to the insertion of the cotton, Mr. Owen, you used the same amount for each ear?

A. No. No, you should examine the ear, and you can discover some ears are very large, some are small,

(Testimony of Frank Owen)

and when you put in a piece of cotton that is too small, you soon discover it and put a larger piece in.

Q. Well, what do you try to do in putting the cotton in?

A. Well, you try to anticipate the proper amount of cotton, and if you should fail to get the right amount, of course, you simply pull it out with the tweezers and start again with a larger amount of cotton.

Q. Well, with reference to fitting the cotton in the ear, should it be a tight fit or a loose fit?

A. It should be a snug fit, yes. It should fit down with all edges of the cotton packed well so that when the [131] plaster goes up against the cotton it will be a square cut earpiece or mold.

Q. And with reference to the impression that you took of Mr. Hartley's right ear, did you do that?

A. Yes.

Q. Now, after you had taken the impression for Mr. Hartley's right ear, what occurred?

A. Well, we removed the impression, and then we had just dealt for one impression, and Mr. Hartley decided, well, while he was about it, he would have an impression made for the left ear.

Q. Did you have any conversation with him at that time relating to the making of the impression for the left ear?

A. No, I don't recall any, except that I think he said, "I might as well have the other one made." He seemed to feel he had a chance to try both ears, I believe. I don't just recall any special conversation.

Q. And you went ahead then and proceeded with the left ear?     A. Yes.



(Testimony of Frank Owen)

Q. What did you do in connection with the making of a mold for Mr. Hartley's left ear?

A. Well, I did the same as in the case of the right ear. I first swabbed the ear out with oil or put the cotton [132] in. It doesn't make any difference. We will say I put the oil in, then put the cotton in, and then poured the mold—made the plaster and then poured the mold and worked it down into the ear with the spatula, let it dry, and then removed it, and then swabbed the ear out, just to make a clean job. That's all.

Q. When you swabbed the ear out—when you swabbed his left ear out, did you observe any plaster in the auditory canal?

A. No. No, if I had, of course if I had, I would have taken it out. If I could not have swabbed it out, I would have reached for it with something or other. But there was no necessity for thinking there was anything in the ear whatever.

Mr. Moore: If your Honor please, I object to the testimony of what he would have done had he done so-and-so, and I ask it be stricken as merely a conclusion of the witness. It is not responsive to the question as to what he did.

The Court: Yes, I think it should go out, ladies and gentlemen, and also that phrase about there was no necessity for thinking anything. You will disregard that.

Q. By Mr. Wheeler: Your answer is solely that you didn't see any plaster in the ear?

A. That's right.

Q. In the inner ear or auditory canal? [133]

A. That's right.



(Testimony of Frank Owen)

Q. What did you observe with reference to the cotton on the left ear?

A. Well, I remember very distinctly, and I was caused to observe it. Naturally, I would make this observation anyway because when you take the ear mold out the first thing you look for is to look for the cotton, and if you see no cotton, then you know you must recover the cotton that is in the ear, because you have put the cotton there. And, of course, in a casual way, when the right ear mold was taken out, I observed the cotton, and when the left ear mold was removed, we were through, and Mr. Hartley arose and said, "Didn't you leave some cotton in my ear?" And I said, "No," and I pointed to the pair of molds, and there were two just as nice ear molds as you could have, perfectly formed and finished, and the cotton was on both of them. I called his attention to it, that there was the cotton on the ear molds.

Q. Did you have any further conversation with him with reference to that point?

A. No. No, by that time Mrs. Hartley had arranged the check, I believe, and we just closed the deal and Mr. Hartley left the hearing aid department.

Q. Did you ever have any further conversations with Mr. Hartley subsequent to that evening?

A. No. [134]

Q. Did you ever have any conversations with Mrs. Hartley subsequent to that evening?

A. I saw Mrs. Hartley once since that time, and that was a few days afterwards, when she called at the store for the earpieces that had been sent. The ear molds had been sent to the laboratory, and they had been returned to the store, and were actually—I had taken the

(Testimony of Frank Owen)

ear molds down to the mailing division to be mailed out, and Mrs. Hartley called after the taking of them down there, and I told her they were down in the mailing division, but that I thought I could still get them, and I went down to the basement, and, sure enough, I got the earpieces which were prepared for mailing and wrapped by Sears, Roebuck, and handed them to her in person.

Q. When you refer to the earpieces, Mr. Owen, to what do you refer?

A. I refer to the finished product, the piece that the Clark Laboratory makes. It is called an earpiece.

Q. That is similar to Defendant's Exhibit A?

A. It is the plastic piece; it is the earpiece.

Q. Now, the earpieces then for the two ears and the two molds for the two ears were returned; is that correct?

A. Yes.

Q. Do you recall when these molds that you had made on Saturday night were sent to the Clark Laboratory?  
[135]

A. No, I do not recall the date. The date could be established, of course, by the records.

Q. Do you recall how long after the Saturday night on which you made the molds that Mrs. Hartley—that you talked to Mrs. Hartley?

A. No, I do not know the date that Mrs. Hartley called at the store.

(Testimony of Frank Owen)

Q. Was it a week or two weeks after?

A. Well, it would be approximately a week. It would not be two weeks, and it might not be within the one week, because it takes a few days longer, more or less, for the laboratory to get an earpiece back to Sears.

Q. What time was it when you talked to Mrs. Hartley?  
A. To Mrs. Hartley?

Q. Yes. A. It was late in the evening.

Q. Well, what do you mean by late in the evening?

A. I mean—I would judge now from your question, it must have been Friday or Saturday night, because it was late at night. I am not sure about that, however.

Q. Did Mrs. Hartley say anything to you with reference to any difficulty—  
A. Not a thing.

Q. —with reference to the ear molds, or the presence of any foreign substance in her husband's ear? [136]

A. Not a single word.

Q. Did you have any further conversations at any time with Mrs. Hartley or Mr. Hartley?  
A. No.

Q. Mr. Owen, what time does the Sears, Roebuck & Company, the Olympic store, or Ninth Street store, whichever it might be referred to, what time does it close on Saturday night?

A. At that time it closed at 9:30.

Q. And when are the lights turned out with reference to closing?

A. On Friday and Saturday night the lights—they keep the lights on a little longer than on other evenings,

(Testimony of Frank Owen)

and I couldn't say exactly, but I should say they turn the lights off at 9:45, somewhere around there. The clerks have a good deal of cleaning up to do on Saturday night.

Q. But the store closes—

A. 9:30 is the business hour, they close up business, but the lights remain on for stragglers to get out of the store and for clerks to clean up their accounts, turn in their cash, and so forth.

Mr. Wheeler: I have no further questions. You may examine.

The Court: I think we will defer that, Mr. Moore, until morning. [137]

Mr. Moore: Yes, your Honor.

The Court: Ladies and gentlemen, we will take a recess until 10:00 o'clock tomorrow morning. Remember the admonition and keep its terms inviolate.

Mr. Bailiff, will you pick up that mold and give it to the clerk, please?

Mr. Wheeler: If your Honor please, I will offer that now as Defendant's Exhibit D.

Mr. Moore: No objection.

The Court: Very well. So ordered.

(The mold referred to was marked as Defendant's Exhibit D, and was received in evidence.)

The Court: Please retire, ladies and gentlemen, and be here in the morning at 10:00 o'clock.

(Whereupon the jury retired from the court room, and the following proceedings were had outside the hearing and presence of the jury.)

The Court: Gentlemen, I received these requested instructions, but apparently neither of you have complied with Rule 14 of the Court. You had better read that rule and submit your objections in writing, if you have any. We have, for the purpose of simplifying the matter, numbered these pages so that you could refer to them. We have numbered both of them consecutively. I believe there are thirty-three requested instructions on behalf of the plaintiff, and ten [138] requested instructions on behalf of the defendant. I would like to have those objections so that we will have them seasonably in the morning before 10:00 o'clock.

Mr. Wheeler: Yes, your Honor. And at this time I wish to apologize for being late this morning. It was entirely unintentional and was a matter over which I didn't have any control.

The Court: With the transportation difficulties some of those things are excusable at this time, but try to be here in the morning at 10:00 o'clock.

Mr. Wheeler: Certainly.

(Whereupon, at 4:30 o'clock p. m., May 8, 1946, an adjournment was taken until 10:00 o'clock a. m., May 9, 1946.) [139]

Los Angeles, California, Thursday, May 9, 1946. 10:00 A. M.

The Court: All present. Proceed.

FRANK OWEN,

called as a witness on behalf of the defendant, having been previously sworn, resumed the stand and testified as follows:

Mr. Moore: Your Honor please, I believe we were to start the cross examination of Mr. Owen?

The Court: Yes, sir.

Mr. Wheeler: Before you start your cross examination, I would like to ask one or two questions that I overlooked.

Mr. Moore: No objection.

Direct Examination (continued)

By Mr. Wheeler:

Q. Mr. Owen, when you removed these molds from Mr. Hartley's ears, did you do anything to them at all prior to the time that you sent them to the Clark Laboratories? A. Nothing whatever.

Q. In other words, they were in the same condition when you sent them to the Clark Laboratories that they were when you removed them from Mr. Hartley's ear?

A. Exactly.

Q. That was true as to the cotton, was it?

A. I beg your pardon?

Q. Did you remove the cotton? [141] A. No.

Q. Now, if you will examine Defendant's Exhibits B and C, I will ask you if these are in the same condition as they were when you sent them to the Clark Laboratories?

A. No; no, they are not in the same condition now.

(Testimony of Frank Owen)

Q. What differences are there?

A. Well, in the first place the cotton has been removed, and there is—the laboratory has waxed over that with a sort of a wax, I would call it.

Q. Will you hold them up and indicate where the wax has been applied?

A. The cotton protruded from the end of the ear mold at that point there (indicating).

Q. Indicating the prong that went into the auditory canal?

A. Yes, that part right there, as it was in the mold made yesterday. The cotton has been removed. By the way, we were instructed by the Clark Laboratories—

The Court: No just answer the question.

The Witness: The cotton has been removed, and this is waxed over. I can't tell you just why that is done, but that is done always.

Q. By Mr. Wheeler: And is there anything else that has been done, or any other change that you notice in the mold?

A. The only other change is that the laboratory has [142] sliced off the portion of the mold that they don't wish to use.

Q. That is the portion—

A. The outer portion.

Q. The outer portion of the outer ear?

A. That's right.

Q. What can you state as to the length of the prong that went into the auditory canal on Defendant's Exhibit



(Testimony of Frank Owen)

C, which I think is the one which was removed from the left ear?

A. Well, it is just the average length, I should say. They may vary considerably, the length of a prong, as you call it, but this is the average, I would say.

Q. And what determines the length of the prong?

A. Well, the depth which you place—the depth of the cotton. If you put the cotton deep in, why, it would make a little longer prong.

Q. Does the length of that prong appear to be the same as it was when you sent it to the Clark Laboratories?

A. With the exception of the wax that is put over the end, I would say it is the same.

Q. Have you ever made a prong which would be two-thirds of an inch long?

A. Two-thirds of an inch?

Q. Yes.

A. Well, that would be a rather long prong, though it could be done, I think. [143]

Q. Have you ever?

A. I do not believe I have.

Q. Would you have taken particular notice of it if you had? A. Yes, I think so. Yes, I would have.

Q. Can you state as to whether the prong on the mold that you removed from the left ear of Mr. Hartley was two-thirds of an inch long?

A. No, it could not have been two-thirds of an inch long.

Q. Now, Mr. Owen,—

Mr. Moore: I object to that answer as not responsive. He said "it could not have been." He did not answer whether it was.

(Testimony of Frank Owen)

The Court: He said, "No," and then added something. The last part of the answer will go out. The first part will stand, the negative answer.

Q. By Mr. Wheeler: In removing the mold from Mr. Hartley's left ear, did you break off the prong or any part of the prong?

A. No, I am sure I did not, because if I had I would have put two pieces in the package for the laboratory. As it was, the two ear molds lay on the tray, and they were—one was right, one was left, a pair, the first pair that I had ever made, and there they were, and when Mr. Hartley first [144] arose and said, "Didn't you leave some cotton in my ear?" I pointed to the earpieces again, and I looked at them again and said, "No, there is the cotton there."

Mr. Moore: Now, pardon me, please. I would like to make an objection and ask that the last portion of his statement be stricken, after the word "No," the following part of the answer to the question, as to whether he broke it off, as a conclusion of the witness.

Mr. Wheeler: I think, if your Honor please, he was merely amplifying his statement; I mean his certainty as to the fact that he did not break it off.

The Court: Gentlemen, I do not want you to argue objections or motions before the jury. Read the answer, please.

(The answer was read.)

The Court: Motion denied.

Mr. Wheeler: I have no further questions.

(Testimony of Frank Owen)

Cross-Examination

By Mr. Moore:

Q. Mr. Owen, you have stated on direct examination that you didn't recall why Mr. Hartley came to your department. Isn't it a fact that when he first came to your department and talked to you, he asked for batteries?

A. It may be. I am not sure about that. I don't know just the facts regarding his first visit.

Q. Now, advertng to the operation which you demonstrated [145] to the jury on Mr. McKenna, how do you determine the amount of cotton which you will need in a particular ear?

A. Well, when you look at the ear you can fairly well determine that. You can take a little quantity and decide you didn't need as much cotton, and then find you needed more, and in that event you take another piece, and you would cast the other aside.

Q. This is placed in what portion of the ear?

A. In the auditory canal.

Q. Calling your attention to the diagram which is hanging on the board, is this portion between what appears to be hairs in the ear and the eardrum the auditory canal that you refer to?

A. As I understand, that is the auditory canal, yes.

Q. How do you determine whether the auditory canal is filled with cotton?

A. Well, you can see the cotton. You can see the cotton in the auditory canal and, of course, you don't let it go beyond the point of sight. If you did, it might be lost way deep in the auditory canal.

(Testimony of Frank Owen)

Q. In putting cotton in the auditory canal, do you take any method or see that it goes down to the eardrum?

A. Oh, no, it never reaches the eardrum. I mean to say that—you asked me if I take a method. Pardon me. No, there is no method, but you simply pack it just a sufficient [146] depth so as to prevent the plaster from going in.

Q. Is this a tight pack or a loose pack of cotton?

A. Rather a firm pack.

Q. Now, what would be the effect of not having any cotton in the auditory canal, with respect to the putting in of the plaster?

A. Well, quite likely—quite likely, if you poured the plaster right in, it would clog up, and it would not reach the drum of the ear—

Q. What would prevent it?

A. As I say, it would clog up and the air back of the plaster would prevent it from going farther down.

Q. If you had a very loose pack of cotton rather than a tight pack, what would be the effect of pouring the plaster in?

A. I wouldn't think any plaster could escape.

Q. Do you know, of your own knowledge, whether it would or not?

A. No, I couldn't say that. I never had the experience of it doing so.

Q. Do you always clip the hairs in the ear of any person for whom you are making the mold?

A. Wherever the hairs are coarse and heavy hairs, they are clipped off or you will have pain in extracting the piece.

(Testimony of Frank Owen)

Q. But there are occasions in which you do not? [147]

A. Oh, yes, there are occasions.

Q. Now, in October, 1945, how did you estimate the amount of plaster that was needed for a particular mold?

A. Well, you don't estimate any—you almost take the same amount of plaster, and if you have any over, you simply throw it away. There is nothing to that.

Q. How did you determine the amount of water to use?

A. That is a matter of judgment. You don't want to get it too thin or too thick.

Q. In fact, the consistency of your material for molds varies from time to time?

A. Not a great deal. There is plenty of latitude there.

Q. Depending upon the consistency as to whether it is thin or thick, is there any difference in the drying properties?

A. It would dry a little faster when it is a little thicker.

Q. How about the uniformity of drying throughout the mold?      A. I think it dries uniformly, the same.

Q. You think it would dry with the same speed at the bottom of the mold as it would in the part that is at the top of the ear?

A. I think so; just the same as if it was a thinner mix. [148]

Q. Have you ever made any experiments to determine whether that is true or not?      A. No, I haven't.

Q. Do you use sterile instruments, such as your tweezers and spatulas, in connection with your work?

A. Yes.

(Testimony of Frank Owen)

Q. What do you do to sterilize them?

A. Dip them in a solution.

Q. What sort of a solution?

A. We have a solution we clean the ear with; the same solution.

Q. Is that what you said was a sort of a mouth wash?

A. Yes.

Q. Now, you indicated the use of a spatula to get out the air bubbles from your mold. Do you push at all with that spatula? What motion do you use in using the spatula?

A. Well, you first pour the plaster in, and then you work the plaster down into the cotton, against the cotton, so that you have no bubbles in the ear mold.

Q. Now, in using your operation of pushing the flesh away from the mold when you are removing it, might that not cause a portion of the plaster mold to break off? A. Break off where?

Q. Break off of the mold.

A. Occasionally around the edge of the mold, where it [149] is very thin, it would break off, if that is what you refer to.

Q. How about that prong that you have referred to? Could it not break off the prong?

A. That could break off the prong in that case, but if it did we would all know it, and then you would have a job to do. You would have to recover the piece of plaster that is left in the ear.

Q. Does the cotton always come out with the mold?

A. Not every time. I had just one occasion in which it did not come out.

(Testimony of Frank Owen)

Q. You mean out of the 150 molds you made only one time it did not come out?

A. I don't recall of any other time. I don't recall of any other, and then, as I say, you have a job to do. You have to recover the cotton, and if you don't recover it, and if the individual can't recover it, then there is a job for a physician or a surgeon.

Q. Now, referring to the making of a mold for Mr. Hartley, do you recall at this time how much cotton you used in connection with the operation on him?

A. No, I do not.

Q. Do you recall now whether or not you clipped the hair in his ear, either in his right or left ear?

A. I am not sure about that.

Q. Do you recall at this time whether you swabbed his [150] ear with oil, either one of the ears, or both?

A. Yes. That question is as I have answered you the other day.

Q. When you say "the other day", you refer to your deposition—

A. Yes.

Q. —which was taken in Mr. Wheeler's office?

A. Yes. I believe my answer was that to say that you turned right or left, or whether you did this or not, I can't be positive, but it must have been done or I would have had difficulty in removing the earpiece, it would stick in the ear.

Q. Do you recall now whether the mold in Mr. Hartley's right ear stuck to the ear?

A. No, it did not.

Q. You recall it?

A. I am sure it didn't. It came out easily. He did not complain of any pain. If it had stuck, there would have been pain and a little trouble.



(Testimony of Frank Owen)

Q. What about the left ear?

A. The same thing.

Q. You mean he did not complain of any pain?

A. No, no pain. As soon as he arose from the chair, he said, "Didn't you leave some cotton in my ear?" And I pointed to the cotton on the ear molds. [151]

Q. Do you recall at this time any of the individual moves that you made with respect to either the right mold or left mold of Mr. Hartley's ears?

A. No; no, I don't.

Q. In other words, in telling us what you did, isn't it a fact that you are basing it upon what your usual methods are rather than upon a specific recollection in that case?

A. Yes. I will say it is, out of 100 ear molds how many of them could you say that I just did exactly this in any particular one? I couldn't say definitely. But I certainly had the wax in there—I mean the oil in there, or else I could not have removed the mold.

Q. Do you recall how long it took for the mold to set in his right ear?      A. No, I do not.

Q. Is the same thing true with the left ear?

A. Yes.

Q. Now, when Mr. Hartley said to you, "Isn't there some cotton in my ear?" did he indicate which ear he was referring to?

A. Well, he referred to the left ear, because that was the last mold we took, and that is when he made the remark.

Q. But he didn't specify the left ear?

A. No, but I pointed to both earpieces, ear molds, and there was the cotton on the end of both of them. [152]

(Testimony of Frank Owen)

Q. Where were the ear molds lying?

A. Lying on a tray on the desk.

Q. The same desk on which he had laid his head?

A. Yes.

Q. Where was Mr. Hartley standing when you pointed out these ear molds?

A. He had just risen from the desk, you might say, where he had his head laid on the pillow, and stood up and made that remark.

Q. Do you know whether he looked at the ear molds or not at that time?

A. I don't know whether he gave special attention to that; I couldn't say that; but his remark caused me to make that statement, and he surely—I imagine he did.

Q. Which statement do you refer to?

A. "Didn't you leave some cotton in my ear?"

Q. But you made a reply?

A. "No, there it is on the ear molds."

Q. In other words, you made a gesture to the table?

A. Yes, and made the remark that there it is.

Q. Now, did you leave Mr. Hartley to wait on any customers at any time while he was having these molds made?

A. I don't recall that I did.

Q. Did you leave Mr. Hartley for any purpose during that time, that you recall? [153]

A. I probably left to empty the surplus plaster from the cup.

Q. Do you recall doing so?

A. I do not recall doing so.

Q. Do you recall having any telephone calls during the period that you were making the molds?

(Testimony of Frank Owen)

A. I am not sure about that.

Q. You may have had some telephone calls?

A. I may have had, yes. That occurs very seldom.

Q. Now, you have indicated that the store on Saturday night during the month of October, 1945, closed at 9:30. Do you recall on the night of October 13, 1945, what time the Hartleys left? A. No, I do not.

Q. Left your office? A. I do not recall that.

Q. Do you recall on that night whether you made any more molds before closing time?

A. No, I didn't after Mr. Hartley's.

Q. Do you recall whether you waited on any other customers?

A. I think there was a customer or two after that bought some batteries.

Q. Isn't it a fact that you said to Mr. Hartley, in the presence of Mrs. Hartley, or words to this effect, that [154] "You had better hurry up, the lights will be out shortly," or "They will be turning out the lights"?

A. I may have made the remark that we didn't have any time to waste, but still—it turned out that there was lots of time after that, in spite of that statement, if I made it. I may have made it.

Q. Don't you have a clean-up period between 9:00 o'clock and 9:30, or at least did at that time, where your customers were leaving the store and you straightened up your stock, and things of that kind?

A. No, not between 9:00 and 9:30. Your clean-up, if any at all, is after 9:30. You do business until 9:30.

Q. Now, you have stated in response to Mr. Wheeler's questions that the prong on Defendant's Exhibit C is the average size. That is correct, isn't it?

(Testimony of Frank Owen)

A. Those are the average of what I make, yes.

Q. The prong on Defendant's Exhibit C could have been longer than that which exists there and broken off, could it not? A. Could have been longer?

Q. Yes.

A. I would say the prong on either one of them could have been longer; could have been, but it doesn't—there is nothing to show that.

Q. Do you know whether it was or not, of your own [155] knowledge? A. No, I do not, no.

Q. Now, you have indicated, in response to one of Mr. Wheeler's questions, that the cotton had been removed from Defendant's Exhibits B and C. That was a conjecture on your part, was it not? That is, you don't know who removed it, or when, do you?

A. Well. I know that I mailed it to the laboratory with the cotton on.

Q. You personally examined both of them, did you?

A. Yes.

Mr. Moore: No further questions.

### Redirect Examination

By Mr. Wheeler:

Q. Mr. Owen, in fitting the ear molds, or making the ear molds in connection with Mr. Hartley's ears, did you act in any greater haste, or did you act any more quickly in making those molds than you did any other molds?

A. No, not any more than usual. I had plenty of time for that.

Mr. Wheeler: I have no further questions. That is all.

Mr. Goodrich, will you be sworn, please? [156]

J. W. GOODRICH,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: J. W. Goodrich.

By Mr. Wheeler:

Q. Mr. Goodrich, you are a resident of Los Angeles, are you?      A. Yes, sir.

Q. What is your employment?

A. I am the manager of Clark Laboratories.

Q. Clark Laboratories makes these earpieces, does it?

A. Yes, we reproduce the earpiece from the impressions of the ear sent in by the agent.

Q. What volume, or how many earpieces do you make or reproduce in a day?

A. Well, it varies from day to day. It might possibly reach as high as 150, and possibly go as low as 20.

Q. For what area, or from what area do you receive molds for reproduction into earpieces?

A. Well, we get them from Japan, China, and Australia and most parts of the United States and Canada, and a few in Mexico.

Q. Is there any other company that does similar work—[157]      A. Yes.

Q. —in western United States?

A. No, not in western—

Q. Where is the nearest corresponding company?

A. Chicago; although we do have a branch in San Francisco.

(Testimony of J. W. Goodrich)

Q. This is your main office, however?

A. That's right.

Q. How long have you been manager of this company?      A. Approximately 10 years.

Q. Here in Los Angeles?      A. Yes, sir.

Q. Is the work of making earpieces from the molds performed under your direct supervision and care?

A. Yes, sir.

Q. How many people do you employ?

A. Well, right at the moment we have eight in this office.

Q. Now, Mr. Goodrich, will you describe, briefly, what you do when you receive an ear mold, what you do in making an earpiece?

A. When the package comes in, it is put on the receiving bench and opened by—well, there are two to three people that are able to open them, and record them, and anything that may look a little bit out of order in the mold, it is brought [158] to my attention. If it isn't, if it is the regular run of impression, why, it goes through without my O. K.

Q. After the package is opened and the ear molds are removed from the package, what happens?

A. Well, it is numbered. It is numbered with the number of that particular agent that sends it in, so that we can return it.

Q. Referring to Defendant's Exhibits B and C, which I think are before you on the desk, I will ask

(Testimony of J. W. Goodrich)

you if you will examine them and tell us what those numbers are that appear on there.

A. It is ZZ 405-K and KZ 404-K, then "DH", which indicated a double-header, or two molds, and the "K" indicates a small receiver.

Q. When you say a small receiver, you mean a small Zenith type receiver?      A. Yes.

Q. That has nothing to do with the amplifier which is worn, but it is the earpiece?      A. That's right.

Q. It is the little button type receiver that fits into the earpiece?      A. That's right.

Q. And Zenith has a small type receiver?

A. Yes. [159]

Q. Now, have you examined your records to determine the name of the person for whom those molds were made?      A. Yes.

Q. And for whom were they made?

A. They were made for this fellow Hartley.

Q. That is Fred Hartley?      A. Yes.

Q. Now, after the molds are numbered, what happens to them?

A. Then they are reduced in size, and the surplus taken off, and made as near like the finished product as we want them, and then reproduced and impressed, of course, and finished into the finished article.

Q. When you say the surplus is removed, will you just hold that up and show what is actually done?

A. Well, this back is cut off of here, and then it is brought down to the size of the receiver that we might want to use on it.



(Testimony of J. W. Goodrich)

Q. What, if anything, else is done to the mold?

A. Well, it is processed by dipping it in a wax solution, and then all the bubbles, or if there should be any bubbles or any imperfections that we think are not in the ear, they are changed on the cast so that it reproduces as near the ear as possible.

Q. So that these ear molds are examined for the [160] presence of air bubbles? A. That's right.

Q. Or other roughened surfaces?

A. That's right.

Q. And those surfaces are covered with wax?

A. Yes.

Q. Now, does it appear that those molds have been so covered? A. Yes.

Q. And treated? A. Yes.

Q. Will you take Defendant's Exhibit B and indicate where wax has been applied?

A. Wax has been applied on the tip. There is a small air bubble on the top part, and then it has been expanded on the edge, on the fitting edge, and also along here there is a little air bubble that has been filled.

Q. Now, will you examine Defendant's Exhibit C and indicate where wax has been applied?

A. Wax has been applied on the canal part of the ear, as well as on the back; that is, on the bottom surface to raise it in order to make it conform and match the other one, and also there was a small bubble underneath the canal part, and also a small bubble on the back, and also the enlarging on the fitting edge. [161]

Q. Now, when you say that wax has been applied on the canal portion, you are referring to what? I have

(Testimony of J. W. Goodrich)

referred to it as the prong that goes into the auditory canal.       A. Yes, that's right.

Q. And the tip has been covered with wax?

A. Yes.

Q. What is the purpose of putting the wax on the tip?

A. Well, the purpose of that is, when we take the cotton from the tip it leaves a very rough surface, and when we apply the reverse or the matrix, it will not pull loose and will not break it, so we have to put the wax on it to get it to release easily and not break the mold or the cast. Then, also, it will give us a smooth impression.

Q. The instrument, the finished instrument, must be smooth so that it will not irritate the ear?

A. That's right.

Q. Now, you use this pink type of wax. You recognize it, do you?

A. Yes, that is pink wax.

Q. After that is done, what do you do?

A. Then it is reversed; that is, we call it reversed, and there is a matrix made, and then that is put into a flask, and it is pressed in plastic material.

Q. What do you mean by a matrix?

A. The matrix is the reverse of it, the female of this [162] part. In other words, this is turned out, and it is made like the ear, so we can press the plastic into it.

Q. What material is made—from what material is this matrix made?

A. Dental stone, artificial stone.

(Testimony of J. W. Goodrich)

Q. So that you have your master of artificial stone, and you press the ear mold, as you have treated it, into the matrix, or into this material?

A. It isn't just like that, no. The matrix is made in about four or five parts. You couldn't make it all in one part because you could not get it loose from the mold. It would not pull. So we have to make it in four or five parts and take it off in pieces and put it back together when we take this mold out.

Q. I see. But when you have completed the matrix, you have an exact opposite of the ear mold?

A. That's right.

Q. Then when you assemble the matrix, you pour in the plastic material which makes the earpiece?

A. That's right.

Q. Now, will you examine Defendant's Exhibit C, which I think is the mold from the left ear.

A. Yes, that's the left.

Q. Will you remove the wax from the tip of the prong that goes into the auditory canal? [163]

The Court: Have you done so?

The Witness: Yes.

Mr. Wheeler: Counsel, would you like to see it?

Mr. Moore: Yes.

The Court: Show it to the jury.

(The article was passed to the jury.)

The Court: The record shows that all of the jurors have inspected and have had an opportunity to examine the exhibit. Proceed.

Q. By Mr. Wheeler: What can you state as to the surface?

A. I would say that is a rough surface.

(Testimony of J. W. Goodrich)

Q. Can you state as to whether there is any indication of cotton having been against that surface?

A. Yes, there would be.

Mr. Moore: Objected to, your Honor, as not responsive.

The Court: Probably not. You didn't directly answer that question.

The Witness: I am sorry.

The Court: Strike the answer. Read the question again, please.

(The question was read.)

The Court: That can be answered "Yes" or "No."

The Witness: Do you want me to explain that answer?

The Court: No, just answer it first.

The Witness: Yes. Yes, there is an indication. [164]

Q. By Mr. Wheeler: What is the indication?

A. Well, if there was—if there hadn't been cotton there, in the first place it wouldn't have been a full-sized canal, which is indicated. Another thing, instead of having a rough surface, you would have a very smooth surface, indicating an air bubble.

Q. From an examination of that surface, can you tell as to whether it has been broken?

A. I wouldn't say it had been broken, no.

Q. In other words, your statement is that it has not been broken? A. Yes.

Q. What do you mean when you say that there is evidence of a full canal there?

A. Well, it seems to indicate to me if there was evidence of a short canal, you would have, about all the way from a third to two-thirds air bubble, leaving a

(Testimony of J. W. Goodrich)

smooth surface, and you wouldn't have a complete rough surface, as you have there.

Q. Do you have any recollection, Mr. Goodrich, as to whether these particular earpieces were brought to your attention—

A. No, I don't.

Q. —while they were in the laboratory?

A. No, I don't have any recollection. [165]

Q. Would your records indicate it if they had been?

A. Once in a while we do indicate it by putting it on the card, as we have our index, as a bad cast. But this has not been indicated that way on the card, so that evidently at the time they were received they were in the ordinary condition we receive them in.

Q. And they were adequate for the purpose of making the earpiece?

A. Yes.

Q. Now, if you will examine Defendant's Exhibit A, which I think is this piece here, will you identify that?

A. Yes. That belongs to the left ear.

Q. Can you tell whether it was made from one of the molds?

A. Yes, it was made from the left ear mold.

Q. Which is Defendant's Exhibit—

A. C.

Q. —C. That transparent material is the plastic that you use in making the mold?

A. Yes, that is a reproduction of it.

Q. Now, after the earpiece is made from the matrix, what do you do then to the earpiece?

A. It is polished and numbered to correspond with the mold. The mold and the piece that is being worked on, after it has been prepared, it is polished and cleaned

(Testimony of J. W. Goodrich)

up, and the [166] two pieces are kept together until they are shipped. Then they are put in the same box.

Q. You drill the hole in the earpiece,— A. Yes.

Q. —so that the earphone will fit into it?

A. Yes.

Q. And drill a hole into the prong, as I have referred to it, that fits into the auditory canal? A. Yes.

Q. What is the purpose of that hole in the prong of the earpiece?

A. It is to carry the sound directly into the canal.

Q. That is the air conduction? A. Yes.

Q. The method by which the air waves are transmitted? A. Yes.

Mr. Wheeler: I have no further questions. You may examine.

#### Cross-Examination

By Mr. Moore:

Q. Mr. Goodrich, how long has Sears, Roebuck been a customer of your laboratory with respect to earpieces?

A. Why, I can't answer that absolutely because I don't recall the date since they have been sending them in.

Q. Was it sometime after you became manager at the [167] laboratory that they started? A. Oh, yes.

Q. What volume of earpieces do you make for them?

A. Well, that is something I would have to check the records for, to be sure.

Q. Approximately. A. I wouldn't know.

Q. Are there several daily?

A. Well, some days; some days not. It is almost an impossibility to say.

(Testimony of J. W. Goodrich)

Q. Are you able to state what proportion of your business comes from Sears?      A. No.

Q. Can you estimate it as large or small?

A. No, I couldn't.

Q. But you do a substantial amount for them, do you not?      A. Yes.

Q. Now, did you personally have anything to do with the making of the earpiece in Mr. Hartley's case?

A. Yes.

Q. What did you have to do?

A. On the finishing I drill the holes, and I also grind the—it is pretty hard to put that into words—well, finish it up to the extent of grinding off the burrs after they come out of the mold. [168]

Q. Did you have anything to do with the making of the matrix of Mr. Hartley's earpieces?      A. No.

Q. Did you see either of the molds, Defendant's Exhibits B and C, prior to today?

A. I don't understand the question.

Q. Will you read it, please?

(The question was read.)

A. Yes.

Q. When did you first see them?

A. At the time that I polished them or was working on them in my—

Q. You didn't receive them or take them out of the box, did you?      A. No.

Q. Was there a record made of the receipt of these molds from Sears?      A. Yes.

Q. Immediately upon their receipt?      A. Yes.

Q. Did you make that record?      A. No.



(Testimony of J. W. Goodrich)

Q. Do you know who did?

A. I can only know that by the writing on the index card. I don't have the card with me. [169]

Q. You don't have the index card with you?

A. No, I don't.

Q. When did you last examine that index card?

A. I couldn't say.

Q. Within the last few days?

A. Yes, I did. I checked the numbers on the molds, I think a couple of days ago, approximately.

Q. Did you check the index card for anything except the serial numbers?      A. Yes.

Q. What did you check it for?

A. The name and the date.

Q. Anything else?

A. And whatever might be as an indication of a bad cast or a good cast.

Q. Would you say that when the index card is made that in every instance an indication would be made of a bad cast?      A. Yes.

Q. Now, you have indicated you had no recollection of having this particular mold called to your attention. Could it have been called to your attention and you not recall it?      A. Yes, possibly.

Q. Now, it is not quite clear to me as to this matter of the air bubble and the rough edge of the prong. Is it not possible to have a break of the prong leave a rough [170] surface?      A. Yes, that's true.

(Testimony of J. W. Goodrich)

Q. What did you mean by the air bubble? Will you explain that, please?

A. Well, the air bubble—in mixing plaster there is a certain amount of air that is gathered there, you might say, but in putting it into anything, if you put it in a closed surface, you might trap air below so that the air could not get away, and there is an air bubble.

Q. Now, in explaining why the roughened edge of Defendant's Exhibit C, that is, the prong on Defendant's Exhibit C indicated the presence of cotton to you, did I understand you to base that upon the fact that there wasn't an indication of an air bubble?      A. Yes.

Q. But it is true, is it not, that there could be a third possibility, namely, that a piece had broken off the prong, leaving a rough surface?      A. It could be.

Q. And can you tell from your examination of the Defendant's Exhibit C which of the two possible conditions that is causing a rough edge was present, the presence of cotton or the breaking off of a prong.

A. Well, from this light that I have here, I would say that it was against the cotton. [171]

Q. What causes you to say that?

A. Well, from the indication of the surface, the roughened surface.

Q. Could the surface which you observe on the prong on Defendant's Exhibit C have been created by a break?

A. Yes.

Mr. Moore: No further questions.

(Testimony of J. W. Goodrich)

Redirect Examination

By Mr. Wheeler:

Q. With reference to the examination of the record card or index card that you made, Mr. Goodrich, you examined that in my presence several days ago?

A. Yes. I don't recall what day it was. That's why I am not sure of it, but I did check the serial number against the name and found that they were for that certain party.

Q. Yes. Now, did your examination of the index card show anything other than the name of the man and the serial number?      A. Only the date.

Q. And the date?      A. Yes.

Q. In other words, there wasn't any evidence on the card of an imperfect cast?      A. No. [172]

Q. Or any notation?      A. No.

Q. From your examination of the surface of this prong in Defendant's Exhibit C, in your opinion which is more probable, the breaking of the plaster or the presence of cotton?

A. I would say the presence of cotton.

Mr. Wheeler: I have no further questions.

Mr. Moore: No further questions.

The Court: Step down.

Mr. Wheeler: You are excused.

The Court: We will take our recess now, ladies and gentlemen, for five or ten minutes. Remember the admonition, and occupy the jury room.

(A short recess was taken.)

The Court: All present. Proceed.

Mr. Wheeler: Dr. Brown.

DR. GEORGE W. BROWN,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: George W. Brown.

Mr. Moore: If your Honor please, before counsel examines Dr. Brown, I believe the record will show that in asking your [173] Honor to interrogate the jury the doctor was referred to as Dr. George Moore rather than Dr. George Brown. I imagine the question of the jury would be the same, as to whether they knew them.

The Court: Is that true?

Mr. Moore: Yes.

The Court: You should have called the court's attention to it at the time, if that is true. I am not going to interrogate the jury again.

Q. By Mr. Wheeler: Dr. Brown, you are licensed to practice medicine in the State of California?

A. Yes, sir.

(Testimony of Dr. George W. Brown)

Q. Will you state, briefly, your medical qualifications?

A. Well, as to my eye, ear, nose and throat specialty I attended Mayo Clinic, and the Chicago Eye, Ear, Nose and Throat College, and the New York Eye and Ear Infirmary, and the Illinois Eye and Ear Infirmary in Chicago, and I have been 15 years working at the General Hospital in eye, ear, nose and throat; also, I was professor of eye, ear, nose and throat over at the College of Medical Evangelists, and I am on the staff of the Good Samaritan Hospital, and St. Vincent's and Hollywood.

Q. How long have you been specializing in eye, ear, nose and throat, Doctor? [174]                      A. Since 1915.

Q. In California?                      A. Yes, sir.

Q. Dr. Brown, did you make an examination of a Mr. Fred Hartley?                      A. Yes, I did.

Q. What was the purpose of your examination?

A. For testing his left ear for hearing.

Q. When did you make that examination?

A. I believe it was on April the 9th. Anyway, that was when the report was written.

Q. Will you state what your examination consisted of?

A. Well, I took him in my ear room, and I took an electric light and an ear speculum and I looked into the ear, the canal of the ear, and examined the eardrum of the left ear, and the eardrum was normal. That is, there were no scars or any perforations. There was no discharge from his ear. And then I examined his other ear, and found it to be identical. There was a slight retraction of both eardrums as the superior portion of the drum.

(Testimony of Dr. George W. Brown)

Then I tested his ears for hearing with a tuning fork, a C-212 fork. He heard that in his left ear—he heard it by air five seconds by holding the fork up here (indicating) and then right back over the auditory nerve, the nerve of hearing, and he heard it in 25 seconds there.  
[175]

The Court: Is that the left or the right ear, Doctor?

The Witness: The left ear.

The Court: You are pointing to your right ear?

The Witness: Oh, yes. Pardon me. And the low tone fork, which vibrates 64 times per second, he didn't hear that at all. Then I took a kind of whisper, and he could not hear the whisper at any distance; and an ordinary conversation, about like I am talking now, he could hear it at one foot, and that was the same in his right ear. He heard practically the same in each ear.

Then I took an audiogram of it, and the audiogram showed that he was totally deaf in both ears, and there wasn't five decibels difference in the right ear and the left ear. And that was way down at 22,048 vibrations per second.

So I didn't see anything wrong with his ear from any injury, and according to the tuning fork tests he has catarrhal deafness or oto-otitis media, and that is generally caused from catching cold in the Eustachian tube, which you can see over there, which lets air up to the middle ear.

Now, there are 15 pounds of pressure on everything every place; there is 15 pounds to the square inch. This is why you don't hear. The 15 pounds per square inch is pressing on the tympanic membrane, and every time

(Testimony of Dr. George W. Brown)

you swallow you feel your ears click and that is when air goes to the Eustachian tube and goes to the middle ear; but if this Eustachian tube [176] is closed from a catarrhal condition due to sore throat and frequent colds, then this atmospheric pressure of 15 pounds to the square inch is on the eardrum externally and cannot go in internally to counterbalance the external pressure. Therefore, the eardrum is gradually retracted in, and if it is retracted in, it becomes more or less wrinkled and thickened and doesn't vibrate, and doesn't carry the sound waves to the little ossicles in the ear. So you can imagine that, for example, by taking a snare drum and if it is not in the best of condition and is all wrinkled up, then if you hit it it wouldn't make much sound. So that is what I found wrong with this gentleman, was a catarrhal deafness.

Q. Now, in your discussion of his deafness with Mr. Hartley, did he state as to the period of time which he had been deaf?

A. He told me he had been deaf about 15 years.

Q. As a part of your investigation in this matter, did you discuss this case with Dr. Ghrist?

A. I did. After I examined this man I called up Dr. Ghrist and told him I had one of his cases over here for examination, and I told him I didn't see anything—didn't see any injury as a result of any accident, and then he told me of the condition.

Mr. Moore: If your Honor please, I am going to object to any conversation between Dr. Brown and Dr. Ghrist. [177]

The Court: Sustained. I don't believe there was any foundation laid when Dr. Ghrist was on the stand.



(Testimony of Dr. George W. Brown)

Mr. Wheeler: No, your Honor.

Q. By Mr. Wheeler: But as a part of your investigation in this matter, you did discuss it with Dr. Ghrist?

A. I did.

Q. After your discussion with Dr. Ghrist, did you make any further investigation or study of Mr. Hartley's ears?

A. That was—I had already examined Mr. Hartley's ears at that time.

Q. But after your conversation with Dr. Ghrist, you didn't make any further investigation?

A. Oh, yes, I spoke to him. We have a postgraduate course or Mid-winter Convention which continues for two weeks every year, and I told him about it, and he said—

Mr. Moore: Your Honor please—

The Court: Yes.

The Witness: He said—

The Court: No, Doctor.

The Witness: Oh, pardon me.

Q. By Mr. Wheeler: I didn't mean to get any conversation that you had with Dr. Ghrist, but my question was as to whether you made any further examination of Mr. Hartley's ears after your conversation with Dr. Ghrist. A. No, sir; no. [178]

Q. You have indicated, but I want it clear for the record, Doctor, in your opinion, has Mr. Hartley suffered any impairment in the hearing of his left ear as the result of any accident or presence of foreign matter that may have been in his ear on or about October 13, 1945?

(Testimony of Dr. George W. Brown)

Mr. Moore: Your Honor please, I object to that question on the ground no foundation has been laid.

The Court: I think the question is a little too broad. If you are referring to trauma, that is one thing. If you are referring to other matters, there is no hypothesis for the doctor to be permitted to answer that question. Sustained.

Q. By Mr. Wheeler: Did Mr. Hartley—or, what conversation did you have with Mr. Hartley with reference to any accident that may have occurred to him on or about October 13, 1945?

A. Well, he gave me the history. I will read it to you. It says: October 13th the patient states that he was having an impression taken for his ear and a piece of plaster fell into his left ear. He has had impairment of hearing in the right ear for the past 15 years, but since this plaster got into his left ear the hearing has been impaired in that ear. He was under the care of Dr. Ghrist, and he said Dr. Ghrist removed it. It was quite painful at the time. I think he took a general anesthetic. But I didn't see any evidence [179] at this time of any plaster or any foreign body having been in his ear.

Q. Now, was there any evidence of any impairment of hearing as a result of the incident that Mr. Hartley has related?           A. No, sir.

Mr. Wheeler: That is all.

Mr. Moore: No questions.

The Court: That is all.

Mr. Wheeler: Thank you, Doctor. I will call Mr. McKenna.

FELIX W. McKENNA,

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination.

The Clerk: Will you state your name, please?

The Witness: Felix W. McKenna.

By Mr. Wheeler:

Q. Mr. McKenna, you are a resident of Los Angeles, are you?           A. San Gabriel.

Q. You are employed by what company?

A. Sears, Roebuck & Co.

Q. How long have you been so employed?

A. Over two years. Two years, now. [180]

Q. In what capacity are you employed?

A. Supervisor of the hearing aid departments in the Los Angeles district.

Q. How long have you been employed in that capacity?

A. Since I have been employed with Sears, the past two years.

Q. Now, have you had any prior experience in the hearing aid business?           A. Since January, 1937.

Q. Where did you have your first experience in the hearing aid field?           A. Denver, Colorado.

Q. And what did you do at that time?

A. I sold hearing aids for a living.

Q. As a part of the sale of hearing aids, did you have any occasion to make impressions of ears?

A. Yes, sir.

Q. Or to make these ear molds?           A. Yes, sir.

Q. How long were you in Denver?

A. In the business, I was there a little over two years.

(Testimony of Felix W. McKenna)

Q. Well, were you employed by any one, or were you in business for yourself?

A. The first part of that, the first year I was employed by another concern, and the rest of the time I was in my own [181] business.

Q. What type of hearing aids did you sell at that time?

A. Vacuum tube.

Q. Any particular type? A. R-X.

Q. When you left Denver, did you have any further experience in the hearing aid work?

A. Yes, I went to Detroit, Michigan.

Q. How long were you in Detroit?

A. I was there a little over four years.

Q. What did you do in Detroit?

A. I had my own business with the R-X, as distributor for the R-X hearing aid for the state of Michigan.

Q. That was your own business? A. Yes, sir.

Q. You had an exclusive license for the sale of those products— A. Yes, sir.

Q. —in Michigan? A. Yes, sir.

Q. Did you have any people working for you?

A. Yes, sir.

Q. How many people? A. Five.

Q. In connection with your business in Detroit, did you [182] have any occasion to make ear molds?

A. Yes, sir.

Q. After Detroit, where were you?

A. I came to Denver. Or, excuse me. I came to Los Angeles.

Q. Then what did you do in Los Angeles?

A. Well, I didn't do anything for a few months. Then I started working for Sears and opened these

(Testimony of Felix W. McKenna)

departments in the Los Angeles district for Sears, Roebuck & Co.

Q. What has been your experience in the making of ear molds?      A. What has been my experience?

Q. Yes.

A. Well, in the course of that time I probably made, myself, 1500 to 2,000 ear impressions.

Q. And you have had occasion to examine impressions made by others, have you?      A. Yes, sir.

Q. Calling your attention to October 15, 1945, Mr. McKenna, I will ask you if you saw Mr. Frank Owen on that day.

A. That was on Monday; yes, sir, Monday morning.

Q. Do you recall where you saw him?

A. In our booth, where we sell our hearing aids, sitting on a chair right next to his demonstration table.

Q. And this was in which store of Sears, Roebuck & Co.? [183]      A. Olympic and Boyle.

Q. That is sometimes called the Olympic Street Store?

A. The Olympic Street Store, yes.

Q. Do you recall the time of day it was, Mr. McKenna?

A. Just as the store opened in the morning.

Q. What was the occasion of your visit?

A. A regular routine call.

Q. What was the purpose of your call?

A. To instruct them on anything that might come up that they would need instruction on. By my experience in the hearing aid business, why, that is the reason the Sears, Roebuck hired me, is for my qualifications in the hearing aid business. So I opened these departments, and it was my business to supervise each

(Testimony of Felix W. McKenna)

one of the departments and each one of the employees in the departments.

Q. How frequently would you make these visits to the various stores?

A. I got to every store always once a week, and many times twice and three times a week.

Q. How frequently did you have occasion to go into the Olympic Street Store?

A. More often than the other stores because I was close to my office.

Q. In other words, your office is in the same building—

A. Yes, sir. [184]

Q. —as the Olympic Street Store?

A. That's right.

Q. Or in the same building in which Mr. Owen sold hearing aids? A. That's right, sir.

Q. And you would see him more frequently than two or three times a week? A. Yes, sir.

Q. Now, calling your attention again to October 15th in the morning, Monday morning, did you observe any ear molds in Mr. Owen's office on that morning?

A. Yes, sir.

Q. What ear molds did you observe?

A. I observed two ear molds lying on the tray.

Q. Was there anything unusual about these two ear molds? A. No, sir.

Q. What did they appear to be?

A. They appeared to be a right and left ear mold impression.

(Testimony of Felix W. McKenna)

Q. For the same person?

A. I wouldn't know from the first glance. I wouldn't know exactly whether for the same person, but after discussing it, I did.

Q. Did Mr. Owen tell you that these were the impressions for Mr. Hartley? [185]           A. Yes, sir.

Mr. Moore: If your Honor please, I object to any conversations between Mr. Owen and Mr. McKenna, and ask the last question and answer be stricken.

The Court: Yes. The question should have been objected to; *res inter alios acta* would apply. You will disregard that last answer, ladies and gentlemen. It will be stricken from the record and the objection is sustained, although it was too late.

Q. By Mr. Wheeler: Do you recall these two ear molds?           A. Yes, sir.

Q. Did you make any particular examination of them?

A. Yes, sir.

Q. What examination did you make?

A. I observed them very closely. The molds were sitting there. Your Honor, may I show you how?

The Court: You had better just answer the questions, Mr. McKenna, and stop when you do answer them. You will save a lot of time if you do that.

The Witness: All right, sir. Will you repeat the question, please?

(The question was read.)

The Witness: A close eye examination.

Q. By Mr. Wheeler: Did you note the presence or absence of cotton on the ear molds? [186]

A. Yes, sir.



(Testimony of Felix W. McKenna)

Q. And what did you observe?

A. I observed a normal ear mold with cotton on both canals of the ear molds.

Q. Did you make any examination as to the length of the prong or portion of the ear mold that goes into the auditory canal?

Mr. Moore: Objected to as leading and suggestive. I haven't raised objections heretofore on that, but counsel has asked a number of questions that are leading and suggestive questions.

Mr. Wheeler: Well, I think—

The Court: No argument on an objection unless I ask for it, gentlemen. Sustained.

Q. By Mr. Wheeler: What other examination did you make of the ear molds?

A. I didn't pick the molds up in my hands because it wasn't necessary. There were—I was sitting right here, and the ear molds were right here, and the table was right here. I examined them right here, and it wasn't necessary to pick them up at all.

Q. What can you state as to the condition of the molds at the time of your examination?

A. They looked like very normal, excellent molds.

Q. What can you state as to the—well, that may be [187] the same question. Mr. McKenna, have you met Mr. Hartley before? A. Before? Yes.

Q. When did you meet him?

A. Out to his home.

Q. Do you recall the time?

A. In the evening, near in the neighborhood of six o'clock in the evening.

(Testimony of Felix W. McKenna)

Q. Do you recall the day of the month, and the month?

A. Well, sir, it was on Thursday or Friday, I believe.

Q. Do you recall what month? A. October.

Q. Did you have any conversation with Mr. Hartley with reference—

A. Excuse me. I saw Mr. Hartley before that. I saw Mr. Hartley out at his place of business, out where he works. That was on, I think it was Tuesday. No, I wasn't either. It was Wednesday, about Wednesday, I think it was, during the middle of the week.

Q. You had a conversation with him at that time?

A. Yes, sir.

Q. And you had a conversation with him at the time you saw him at his home? A. Yes, sir.

Q. Now, during that conversation was there any [188] discussion as to whether Mr. Hartley had the materials that had been removed from his ear?

Mr. Moore: Objected to, your Honor, as leading and suggestive.

The Court: That simply directs his attention to an incident, and he can answer it "Yes" or "No."

The Witness: Yes.

Q. By Mr. Wheeler: What was that conversation?

A. He said that he had—he told me his experience. He said that he had had some plaster in his ear, and said he went over to Dr. Ghrist on Monday of that week, and couldn't have it removed, so the doctor asked him to come back the next day, and gave him the anesthesia, and told me he was on the table quite a long time, and he was there all night, and he said when he got up in the morning he still thought it was night, and he said he was going to get up and get his supper and

(Testimony of Felix W. McKenna)

the nurse told him, or, asked him, "Do you know what day it is?" He said, "No," and he said, "I want to get my supper." She said, "No, this is morning." I remember that part of the conversation.

Q. I will ask you if you had any conversation with reference to whether Mr. Hartley had the portions of the plaster that had been removed from his ear.

A. Yes.

Q. What was that conversation? [189]

A. He said the doctor had them, had the portions of the plaster that he removed from his ear.

Mr. Wheeler: I have no further questions.

#### Cross-Examination

By Mr. Moore:

Q. Do I understand that the conversation at the place of business there took place on the Wednesday following the sale of the aids on the previous Saturday, the previous Saturday being October 13, 1945?

A. Yes, sir, I think it was.

Q. At what time of the day was it?

A. Early in the morning.

Q. When did Hartley tell you he had been in the hospital? A. That morning.

Q. That same morning?

A. It was the morning that I saw Mr. Hartley.

Q. And he told you that he had been in the hospital that same morning?

A. I may be wrong in my days there, see. I may be wrong in my days, but it was after Mr. Hartley had been in the hospital.

Mr. Moore: No further questions.

Mr. Wheeler: I have no further questions. I have no further witnesses, your Honor. [190]

Mr. Moore: No rebuttal, your Honor.

The Court: It is about twenty minutes of twelve, gentlemen. I think probably we could excuse the jury. Let me inquire how long a time do you gentlemen think you want to argue this case? You have two arguments, Mr. Moore. Suppose we ask you first.

Mr. Moore: I would say my opening argument should not take over 15 or 20 minutes at the most.

The Court: And your closing?

Mr. Moore: And the closing, depending on how many matters I have to rebut, I would say not over 15 minutes.

The Court: And what do you think, Mr. Wheeler?

Mr. Wheeler: I would think it would take about half an hour, that would be sufficient.

The Court: We will allow a half hour on each side for each argument, and the plaintiff's argument to be divided as counsel for the plaintiff sees fit; provided he opens his case in full in the opening argument, so that the defendant may respond to that case.

Now, ladies and gentlemen, we will take a recess so far as you are concerned until 2:00 o'clock this afternoon. Remember the admonition and keep its terms inviolate. Be here at 2:00 o'clock, please, and leave the court room.

(Whereupon the jury retired from the court room, and the following proceedings were had outside the hearing and presence of the jury:) [191]

The Court: The record shows that the jurors are all without the hearing of the court. Is there anything further at this time, gentlemen?

Mr. Wheeler: At this time, your Honor, I move that the jury be instructed to return a verdict for the defendant on the ground that the plaintiff has failed to sustain his burden of proof, that there is no evidence of negligence, as alleged in the complaint, and that it does not appear that there is any evidence to sustain the allegations of the second count.

Mr. Moore: Do you wish to hear from the plaintiff at all, your Honor?

The Court: Anything further, Mr. Moore?

Mr. Moore: Nothing, your Honor, other than to say that I move the court to direct the jury to bring in a verdict for the plaintiff, in that the evidence clearly shows that there has been negligence on the part of the defendant, and the sole question is one of damages. In response to the other question, assuming that that is not correct, there is still at least a conflict in the evidence sufficient to take this matter to the jury.

The Court: Is your motion predicated upon both counts of the complaint, or otherwise, Mr. Moore?

Mr. Moore: The motion to direct the jury to bring in a verdict is as to the first count, your Honor.

The Court: What do you say as to defendant's motion [192] as to the second count?

Mr. Moore: As to the second count, your Honor, we feel there is sufficient evidence to take the second count to the jury, based upon the fact that Mr. Owen testified, under examination by me, as to a course of conduct which was ordinarily followed, which seems to me from his testimony to require a protection of the canal of the ear, recognizing it as being an unusually sympathetic organ and one that is easily susceptible of injury; that there is at least circumstantial evidence, if not direct evidence, that he permitted a foreign substance to get

into the auditory canal, which would not be the exercise of the care and skill ordinarily followed in that particular profession or employment, namely, that of making ear molds for hearing aids. For that reason I feel that the defendant's motion as to the second cause of action should be denied.

The Court: Do you think there is any evidence in the record on the part of the plaintiff tending to show the customary, usual and approved method of doing this work by other than physicians or aurists?

Mr. Moore: I do, your Honor, in the very testimony of Mr. McKenna and Mr. Owen himself. Mr. McKenna, as supervisor for all of these Sears hearing aid departments, as I understand it, has been doing this work for a considerable period of time and has had 1500 to 2,000 impressions taken by him. [193] Mr. Owen himself, after taking his instructions from the Clark Laboratories and also from Mr. McKenna, did 150 impressions over the period of a year. It does not seem to me that we have to bring in some one from another store or another hearing aid department to testify what is the usual and customary method of carrying out this process.

The Court: If you rely upon that testimony, isn't all that it shows,—I mean, so far as the plaintiff's case is concerned now,—

Mr. Moore: Yes, your Honor.

The Court: —that the salesmen of Sears, Roebuck followed the usual, customary and approved method employed by those other than physicians in the matter?

Mr. Moore: That is correct, your Honor.

The Court: If they did so employ the method, where is there any basis for any case on the second count?



Mr. Moore: Our second count is based upon the lack of the use of this skill used by persons doing that sort of work in this particular case.

The Court: In other words, you are going to argue, under Mr. Owen's testimony as to the proper method, proper and approved method by those similarly situated in the trade, that Mr. Owen's activities at the time of the incident did not measure up to the standard?

Mr. Moore: Yes, it is my contention they did not measure [194] up to the standard.

The Court: Then you are going to apply the test. Have you any testimony in the case other than the doctors' evidence as to what the practice was in similarly situated businesses and trades?

Mr. Moore: Not other than Mr. Owen's and Mr. McKenna's testimony.

The Court: So that you are going to make your argument, if you are going to argue that, solely upon the evidence of Mr. McKenna and Mr. Owen?

Mr. Moore: Yes.

The Court: All right. I believe there is sufficient here to submit it to the jury under proper instructions. It seems to me that it is a factual question. I am not going to enlarge on it at this time except to state the reason for the ruling so that the litigants and counsel will be apprised as to why the court rules in the manner in which it is ruling.

The matter simmers down to a factual difference between Dr. Christ's testimony, together with the plaintiff's



evidence, his own testimony, of course, and the testimony of the defendants as to the presence or absence of this material in the ear after the incidents testified to as having occurred in the store of the defendant, Sears, Roebuck & Co. That is simply a factual question, and that was the reason why, in ruling on the motion for a non-suit, the court denied the [195] non-suit.

Dr. Ghrist's testimony, it seems to me, raised a material, corroborating feature there, which is purely a factual question for the jury; and, of course, the other crucial question to be discussed would be the question of damages, as to what would be the damages. And that would be a factual question, under proper instructions.

I haven't yet had time, gentlemen, because neither of you complied with the rules until this morning, to consider the requested instructions and the objections. I shall do so between now and 2:00 o'clock, and before the argument you will know, both of you, just which instructions the court is going to give. I am going to disregard the argumentative instructions. There are a number of them proposed by the plaintiff. And as far as seems proper, I am going to follow the approved instructions promulgated by the judges of the Superior Court of Los Angeles County, because this is essentially a local case.

We will meet at 2:00 o'clock, gentlemen.

(Whereupon, at 11:50 o'clock a. m. a recess was taken until 2:00 o'clock p. m. of the same day.) [196]

Los Angeles, California, Thursday, May 9, 1946, 2:00 p. m.

(The following proceedings were had in chambers, outside the hearing and presence of the jury:)

The Court: Gentlemen, pursuant to Rule 51 of the Rules of Civil Procedure, both sides being represented by their respective counsel, in the absence of the jury I will tell you the instructions which I am going to give, first, and then I will tell you those which I am not giving.

The court is going to give plaintiff's requested instruction No. 7, No. 33—that looks like "33," Mr. Moore, and I am not sure—

Mr. Moore: Yes, that is right.

The Court: —33, 1, 5, 28—I have modified them some by striking out the words "You are instructed" in each proposed instruction, and in some other respects as indicated in the charge, but not in any substantial way, I think, and probably more a matter of phraseology than anything else—28, 15. I have incorporated in that the words "negligence and contributory negligence," so as to not make the instruction merely applicable to the issue of contributory negligence, but as to the both contributory negligence and negligence and I have stricken the matter from line 7 to and including line 10. I am giving 31, and I have inserted on line 7 after the word "departure" the words "if any," so that it will read "and [197] that this departure, if any, from the recognized practices proximately caused the injury and disability of the plaintiff." I am giving 18, and I have substituted on the first line in lieu of this phrase "one or the other of the parties" the words "either plaintiff or defendant," and I am not giving the second paragraph. 14 I have modified, and I practically adopted the objections made

by the defendant to the proposed instruction, and have also added at the end of the proposed instruction, commencing on line 28, after the period:

“The amount sued for is no criterion or test as to the damages you may award, if any, but is merely a limit beyond which you cannot go in any event.”

I have also stricken the matter which occurs from line 22 to and including line 25, which relates to so-called permanent injury, having adopted the objection of the defendant that there was no evidence justifying any award for permanent injury.

Mr. Moore: May I interrupt at that point, your Honor?

The Court: Yes.

Mr. Moore: To ask you this: I gather that it would be improper, then, in making my talk to the jury to mention testimony of Mrs. Hartley to the effect that she noticed some difference before and after, since that evidence was on that issue, and I don't want to make any comments to the jury which [198] are inconsistent with your Honor's instruction.

The Court: I don't know if that would be inconsistent. I will read to you the instruction, and then you can decide:

“If you should find for the plaintiff, then in fixing the sum in assessing the damages, you will be reasonable and just and fix such sum as will in your honest and deliberate judgment, compensate the plaintiff for his injuries, if any, he has sustained as a result of the fitting of the hearing aid. The elements entering into such damages are as follows:

“1. Such sum as will reasonably compensate the said plaintiff for the necessary expenses”—

Now, the word "fairly" should go out, the adverb there. ". . . reasonably compensate the said plaintiff for the necessary expenses, if any, that he has paid for doctor bills, hospital bills, and medicines not to exceed \$23.00.

"2. Such sum as the jury shall award the plaintiff by reason of the physical pain, if any, which he has suffered by reason of his said injuries, if any, or which he is reasonably certain to suffer in the future therefrom, if any.

"The element with respect to the expense incurred to date hereof, if any, is subject of direct proof and must be determined by the jury from the direct evidence that they have before them. The element with respect to the pain and suffering, if any, of the plaintiff is left to the sound discretion of the jury for their determination under all the evidence and circumstances in proof in this case."

Then the last paragraph with respect to the amount sued for, and that the amount is no criterion.

Mr. Moore: Thank you, your Honor.

The Court: Those are all of the instructions requested by the plaintiff that I am giving.

Now, so far as the defendant is concerned, there was an instruction here that I could not get the number of, Mr. Wheeler. I think it was No. 14. It is the one on which there is a citation: California Jury Instructions No. 30. I think it was handed in this morning.

Mr. Wheeler: Yes, that was No. 14, your Honor.

The Court: I am going to give that.

Mr. Moore: Is that the one, "If and when you should find"—

The Court: That is right. I am giving No. 4:

"The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent."

I am giving No. 5. I am giving No. 1, and I have added to it a little bit. I have added the following after the word "person":

"The burden of proving negligence on the part of defendant is upon the plaintiff and in order for the plaintiff to recover he must prove such negligence by a preponderance of the evidence."

Now, I am giving a couple of instructions upon my own motion, because I think neither of you covered the matter. One is:

"Contributory negligence is negligence on the part of a person injured which, co-operating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.

"One who is guilty of contributory negligence may not recover from another for the injury suffered. The reason for this rule is not that the fault of one justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents of causation."

That is taken from this book of instructions. Then another: [201]

"Where the evidence respecting the issue of negligence of defendant or of contributory negligence of plaintiff is evenly balanced, it cannot be said to preponderate.

"The burden of proving negligence of defendant rests throughout the case upon the plaintiff and the burden of proving contributory negligence on part of plaintiff rests upon the defendant."

Then I am giving No. 2 and No. 6. I have stricken from 6: "the mere fact that an accident happened, considered alone, would not support a verdict for any particular sum." I think that is covered by another instruction.

Mr. Wheeler: Yes, your Honor.

The Court: I am giving No. 8, No. 12, No. 7, and No. 9.

All of the other proposed instructions I am not giving, except as they are modified in the instructions which will be given, and except also as the principles stated in those proposed instructions that are not given are contained in the portion of the instructions given.

Do you all understand it now?

Mr. Wheeler: Yes, your Honor.

Mr. Moore: I just wanted to check for a moment to see if a certain instruction on contributory negligence has been given.

The Court: The one that I prepared was: [202]

“Contributory negligence is negligence on the part of a person injured, which, co-operating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.”

That is taken from this book of instructions here. Which one do you have in mind? One of your proposed instructions?

Mr. Moore: I was trying to ascertain here, your Honor.

The Court: For instance, No. 22 was one which I think contained elements there. So with No. 10 and so with No. 21.

Mr. Moore: Yes, I think that has been covered, your Honor.

The Court: All right, gentlemen. You know this is going to cut us down a little in the time, but I have to comply with the rules.

Mr. Sobieski: With reference to this instruction No. 14, plaintiff's requested No. 14, you went with us on the point of—



The Court: Is that a damage instruction?

Mr. Sobieski: Yes, that is a damage instruction, sir. The second sub-paragraph allows for future damages.

The Court: "Such sum as the jury shall award the plaintiff by reason of the physical pain, if any, which he has suffered by reason of his said injuries, [203] if any, or which he is reasonably certain to suffer in the future therefrom, if any."

The evidence which would support that, and I am not expressing any opinion upon it, but you will remember his testimony about his head hurting him, or not hurting him so much, that he had a sensation up there, and his wife testified that he experienced discomfort yet to some extent.

Mr. Sobieski: We thought that both doctors testified he was cured, and the other doctor testified this could be due to another ache or some transference.

The Court: But that would not bar the jury from determining whether they believed the doctor or not.

Mr. Wheeler: May there be an exception noted to that, your Honor?

The Court: Oh, yes. The rule requires that you may state it out of the presence of the jury, and you may state it now.

Mr. Wheeler: We can state it right now, and the authority for the exception is the case of—do you have that?

Mr. Sobieski: That is cited under the first one of our objections. That is *Silvester v. Scanlan*, 136 Cal. App. 107.

The Court: Perhaps I had better read that again. What was that page?

Mr. Sobieski: 107, sir.



The Court: That is one of the purposes of this rule, [204] that you should cite your authorities so that we will have them to look at.

Mr. Wheeler: Certainly.

The Court: That is a bad case, I think. I don't think that would cover here. Here they had two trials, apparently, and this woman has just sustained some trivial superficial injury and the first jury returned a verdict of \$10,000.00. These doctors came in with that characteristic traumatic neurosis, and the court granted a new trial. On the second trial the jury awarded her \$12,500.00, and in the course of the trial they brought out this question of insurance. I think that is a different case than you have here. You haven't any traumatic neurosis here. And there may be some room for the jury here to find it is pretty hard for a doctor to say whether an individual suffers pain. Pain and anguish of that type is something which I don't think can be reduced to a scientific nicety. I think we will have to let the instructions stand, with the exception noted.

All right, gentlemen. If you want to cut your argument any by reason of our taking this time, you may do so. Otherwise we may have to have the jury out tonight. But I am not insisting that you do so.

(Thereupon the proceedings were resumed in the court room in the hearing and presence of the jury, as follows, to-wit:) [205]

The Court: All present. Proceed with the argument, Mr. Moore.

(Opening argument on behalf of the plaintiff by Mr. Moore.)

(Argument on behalf of the defendant by Mr. Wheeler.)

(Closing argument on behalf of the plaintiff by Mr. Moore.)

The Court: Ladies and gentlemen of the jury, you are instructed as follows:

It is the exclusive province of the court to instruct you as to the law applicable to this case in order that you may render a verdict upon the facts as determined by you and the law given by the court in its instructions. It would be a violation of your duty for you to attempt to determine the law or to base a verdict upon any view of the law other than that given you by the court.

On the other hand, it is your exclusive province to determine the facts in the case and to consider the evidence for that purpose. The court cannot determine the facts or aid you in arriving at them, except by giving you the rules of law to be used by you in arriving at the truth.

There are two classes of evidence which are recognized by and admitted in courts of justice, upon either of which juries may render their verdict. One is direct and positive testimony of an eye witness and other direct evidence, and the other is proof or testimony, or other evidence, of a chain of circumstances pointing sufficiently strong to affirmatively [206] establish the facts in dispute, and which is known as circumstantial evidence. There is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence. Circumstantial evidence, like direct evidence, is legal and competent evidence to be received in civil cases. All that is required with reference to either direct or circumstantial evidence is that the testimony and other evidence shall be sufficient to convince you, as a member

of this jury, as a reasonable and prudent man or woman, of the truth of the facts.

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and experience has become an expert in any act, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it.

If and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence actually offered by him on that point.

The defendant, Sears, Roebuck & Co., is a corporation and [207] as such can act only through its officers and employees, who are its agents. The acts and omissions of an agent done within the scope of his authority are in contemplation of law the acts and omissions, respectively, of the corporation whose agent he is.

It has been established that Frank Owen was an employee of the defendant, Sears, Roebuck & Co., that he was the manager in charge of the hearing aid department of the store of the defendant located at 2650 East Olympic Boulevard, Los Angeles, California, and that on or about the 13th day of October, 1945, said Frank Owen, acting as the agent of said defendant corporation and within the scope of his authority, fitted a hearing aid for the plaintiff, and in that connection prepared molds of a plaster-like substance in and for both of plaintiff's

ears. Thus, the conduct of said Frank Owen shall be deemed by you to have been the conduct of the corporation, Sears, Roebuck & Co.

In determining the rights and obligations of the defendant with respect to the fitting by defendant's employees of hearing aids, certain established rules of law are applicable.

If a person suffering from defective hearing goes to another person for the obtaining of a hearing aid and the fitting thereof, and then enters into an agreement for the purchase and fitting of said hearing aid, and the fitter of the hearing aid undertakes the process of so fitting such an [208] aid on said person whose hearing is so impaired, the law created for the parties is called an implied contract, and under said implied contract the person employed to so fit said hearing aid impliedly contracts that he possesses that reasonable degree of learning and skill ordinarily possessed by others of his profession or craft in his locality and that he will use reasonable and ordinary care and diligence in the exercise of his skill and the application of his knowledge to accomplish the purpose for which he is employed.

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent.

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then he has failed to fulfil his burden of proof. To put the matter in another way, if after considering all the evidence, you should find that it is just as probable that either the defendant was not

negligent, or if he was, his negligence was not a proximate cause of the accident, as it is that some negligence on his part was such a cause, then a case against the defendant has not been established.

Because I have given or will give you instructions on negligence or contributory negligence, it is not to be taken [209] that the court thereby thinks the defendant was guilty of negligence or the plaintiff was guilty of contributory negligence, or that I have any opinion on the subject.

If you find from the evidence that Frank Owen, as the agent and employee of defendant, departed from recognized practices exercised by persons fitting hearing aids in this community on or about the month of October, 1945, and that this departure, if any, from the recognized practices proximately caused the injury and disability of this plaintiff, then your verdict should be for the plaintiff.

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person. The burden of proving negligence on the part of the defendant is upon the plaintiff, and in order for the plaintiff to recover he must prove such negligence by a preponderance of all of the evidence.

Contributory negligence is negligence on the part of a person injured which, co-operating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.



One who is guilty of contributory negligence may not [210] recover from another for the injury suffered. The reason for this rule is not that the fault of one justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents of causation.

Where the evidence respecting the issue of negligence of defendant or of contributory negligence of plaintiff is evenly balanced, it cannot be said to preponderate. The burden of proving negligence of defendant rests throughout the case upon the plaintiff and the burden of proving contributory negligence on part of plaintiff rests upon the defendant.

Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence.

This rule rests on the self-evident fact that a reasonably prudent person will react differently to different circumstances. Those circumstances enter into, and in a sense are part of, the conduct in question. An act negligent under one set of conditions might not be so under another. Therefore we ask: "What conduct might reasonably have been expected of a person of ordinary prudence under the same circumstances?" Our answer to that question gives us a [211] criterion by which to determine whether or not the evidence before us proves negligence.

Negligence on the part of either the plaintiff or defendant is of no consequence unless it be a proximate cause of the injury or damage complained of. By proximate cause is meant the efficient cause, the one that necessarily sets other causes in operation.

The burden rests upon the plaintiff to prove by a preponderance of the evidence elements of his damage, if any. And by a preponderance of evidence, ladies and gentlemen, is meant such evidence as, when it is weighed with that that is opposed to it, has more convincing force and from which it results that a greater probability is in favor of the party upon whom the burden rests.

It is the duty of a person who has been injured by the negligence of another to use reasonable diligence in caring for his injuries and reasonable means to prevent their aggravation and to effect a recovery.

When one does not use reasonable diligence to care for his injuries and they are aggravated as a result of such failure, the liability of another, whose negligence was a proximate cause of the original injury, must be limited by the amount of damage that would have been suffered if the injured person himself had exercised the diligence required of him. [212]

If your verdict should be for the plaintiff you should, in calculating his general damages, make no award for loss of earnings because there is no evidence of loss of earnings as a result of this accident. For the same reason you should make no award for loss of future earnings because there is no evidence that any earnings will be lost in the future as a result of this accident.

If you should find for the plaintiff, then in fixing the sum in assessing the damages, you will be reasonable and just and fix such sum as will in your honest and deliberate judgment, compensate the plaintiff for his injuries, if any he has sustained, as a result of the fitting



of the hearing aid. The elements entering into such damages are as follows:

1. Such sum as will reasonably compensate the said plaintiff for the necessary expenses, if any, that he has paid for doctor bills, hospital bills, and medicines, not to exceed \$23.00.

2. Such sum as the jury shall award the plaintiff by reason of the physical pain, if any, which he has suffered by reason of his said injuries, if any, or which he is reasonably certain to suffer in the future therefrom, if any.

The element with respect to the expense incurred to date hereof, if any, is subject of direct proof and must be determined by the jury from the direct evidence that they have before them. The element with respect to the pain and suffering, [213] if any, of the plaintiff is left to the sound discretion of the jury for their determination under all the evidence and circumstances in proof in the case.

The general damages in all, however, that may be awarded to the plaintiff, cannot exceed the amount sued for, to-wit, the sum of \$10,000.00. The amount sued for is no criterion or test as to the damages you may award, if any, but is merely a limit beyond which you cannot go in any event.

You are not permitted to award plaintiff speculative damages, by which term is meant compensation for prospective detriment which, although possible, is remote, conjectural or speculative.

You have been instructed on the subject of the measure of damages in this action because it is my duty to instruct you as to all the law that may become pertinent in your deliberations. I, of course, do not know whether

you will need the instructions on damages, and the fact that they have been given to you must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

Ladies and gentlemen, when you retire to the jury room you will choose one of your number to act as foreman, and then will proceed to deliberate carefully, cautiously, dispassionately and impartially upon all of the evidence in the case, and apply the law thereto as it has been given to [214] you in the instructions from the bench in the court room in this case, and when you shall reach unanimous agreement, that is to say, when each and every one of your number shall agree upon a verdict, you will have it reduced on one or the other of the blank forms which have been prepared by the clerk for your convenience only, fill it out in accordance with your unanimous agreement at the appropriate places and spaces by your foreman, and return into court with the signed verdict.

Counsel, have you seen these proposed forms of verdict which the clerk has prepared?

Mr. Wheeler: Yes, we have, your Honor.

Mr. Moore: Yes, we have, your Honor.

The Court: Which of them are satisfactory to both of you? If you will indicate it, I will give those two forms.

(The documents referred to were selected by counsel.)

The Court: These are the two forms of verdict. They will now be handed to the bailiff. Swear the officers to take charge of the jury, Mr. Clerk.

(The officers were duly sworn.)

The Court: Please go with the officers, ladies and gentlemen. If they desire this illustration, may they have it, gentlemen? It has not been marked as an exhibit.

Mr. Wheeler: Yes.

Mr. Moore: We have no objection.

The Court: That is the drawing. [215]

The Clerk: Do you wish the jury to take the exhibits?

The Court: If they so desire; all that have been received in evidence. I don't believe that last plaster of Paris cast was received in evidence.

Mr. Wheeler: My recollection is that I offered it.

Mr. Moore: I raise no objection.

A Juror: Your Honor, if the clerk has a magnifying glass, we would like to borrow it.

The Clerk: We have a small one.

The Court: Tell them to be sure to preserve it, though.

Mr. Wheeler: Here is a larger one, if we can have the same assurance.

(Whereupon, the jury retired for its deliberations, and the following proceedings were had outside the hearing and presence of the jury:)

The Court: Now, gentlemen, with respect to the requested instructions that have not been given, as I told you in chambers I have passed upon all of them and upon each I have indicated the action of the court in not giving it, or in giving it as modified, or in declaring it was not given because substantially given in other instructions, and I shall file those with the clerk; and if you desire to take any further action, either of you, with respect to either the charge as given or the instructions that have been requested and not given, you may do so at this time. [216]

Also, gentlemen, I think I shall file with the clerk now the objections of both plaintiff and the defendant to the proposed instructions of his opponent.

Mr. Moore: All right.

The Court: Then the file will be complete. These are the ones that were presented this morning. I think I got both of these today, did I not?

Mr. Wheeler: That is correct, your Honor.

Mr. Moore: Yes, your Honor.

The Court: So they should be marked filed as of today.

Mr. Wheeler: If your Honor please, we have already stated our objection to the instruction as to the feature of damages. It isn't my purpose to repeat it, other than for the purpose of the record, and we object upon the grounds stated in the written objections as heretofore filed.

The same is true as to the objection in which mention was made of the sum of \$10,000.00, on the ground that was unwarranted under the evidence.

Mr. Moore: Your Honor, I have no exceptions to the charge as given. I would like a few moments to go over the instructions which were refused and then make my statement, if I may.

The Court: Very well. I will be here until the jury returns its verdict. We will take a recess at this time.

(Recess.) [217]

Los Angeles, California, Thursday, May 9, 1946.  
5:03 p. m.

The Court: The record shows that all of the jurors are present, gentlemen.

Ladies and gentlemen, have you agreed upon a verdict?

The Foreman: We have, sir.

The Court: You may hand it to the bailiff, please, Mr. Foreman.

(The document referred to was handed to the bailiff, and then to the court.)

The Court: Read the verdict of the jury, Mr. Clerk.

The Clerk: "In the District Court of the United States, in and for the Southern District of California, Central Division. No. 5103-M Civil.

"Fred Hartley, Plaintiff, vs. Sears, Roebuck & Company, a corporation, Defendant. Verdict.

"We, the Jury in the above-entitled cause, find for the Plaintiff, Fred Hartley, and against the Defendant, Sears, Roebuck & Company, and assess general damages in the sum of Three Thousand Dollars, and special damages in the sum of Twenty-three Dollars. [218.]

"Los Angeles, California  
May 9th, 1946.

"Milton Holden Berg,  
Foreman."

The Court: Ladies and gentlemen, is that your verdict, so say you one, so say you all?

Voices: Yes, sir.

The Court: The verdict being complete, file it, Mr. Clerk, and later, under the direction of the court at the appropriate time, enter the judgment pursuant thereto.

The Clerk: Yes, your Honor.

The Court: Ladies and gentlemen, you are discharged from further consideration of this case, and you may go home until you are called again. You will be notified when that will be.

## CERTIFICATE.

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 20th day of May, A.D., 1946.

MARIE G. ZELLNER,  
Official Reporter.

[Endorsed]: Filed July 20, 1946. [219]

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[Endorsed]: No. 11399. United States Circuit Court of Appeals for the Ninth Circuit. Sears, Roebuck & Co., a Corporation, Appellant, vs. Fred Hartley, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed July 31, 1946.

PAUL P. O'BRIEN  
Clerk of the United States Circuit Court of Appeals for  
the Ninth Circuit.

In the Circuit Court of Appeals of the United States  
· for the Ninth Circuit

No. 11399

FRED HARTLEY,

Plaintiff and Appellee,

vs.

SEARS, ROEBUCK & CO., a corporation, et al.,  
Defendant and Appellant.

STATEMENT OF POINTS ON APPEAL AND  
DESIGNATION OF RECORD

The appellant, Sears, Roebuck and Co., hereby adopts, as its statement of points and designation of the parts of the record to be printed, pursuant to Rule 19(6) of this Court, the statement of points and designation of the record filed in the District Court pursuant to Rule 75 of the Rules of Civil Procedure, the same being a part of this record on appeal, and designates the entire record on appeal for printing.

Dated: 26 July 1946.

JOHN L. WHEELER

JOHN G. SOBIESKI

Attorneys for Appellant, Sears, Roebuck and Co.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jul. 31, 1946. Paul P. O'Brien,  
Clerk.



